85-978

NO._____

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER, IN FACT, THE EIGHTH CIRCUIT COURT OF APPEALS HAS, BY ORDER OR BY LOCAL RULE, REFUSED TO ALLOW THE THREE (3) ADDITIONAL DAYS PERMITTED BY FRAP 26(c) IN FILING THE PETITION FOR RE-HEARING PERMITTED BY FRAP 40(a)?

II.

WHETHER THE LETTER FROM MICHAEL E. GANS, CHIEF DEPUTY CLERK, DATED AUGUST 15, 1985, TRANSMITTING UNSIGNED ORDER, CONSTITUTES FINAL JUDGMENT OF THE EIGHTH CIRCUIT COURT OF APPEALS, FROM WHICH DATE THE NINETY-DAY TIME PERIOD WOULD START TO RUN, PURSUANT TO TITLE 28, U.S.C., SECTION 2101(c), WITHIN WHICH TO PETITION THE UNITED STATES SUPREME COURT FOR A WRIT OF

CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS?

III.

IN THE EVENT THAT THE UNSIGNED ORDER TRANSMITTED BY MICHAEL E. GANS, DATED AUGUST 15, 1985, IS DEEMED TO CONSTITUTE FINAL JUDGMENT OF THE EIGHTH CIRCUIT COURT OF APPEALS, WHETHER THE APPELLATE COURT OVERLOOKED OR MIS-APPREHENDED SIGNIFICANT ISSUES OF GRAVE CONSTITUTIONAL DIMENSION, OR RENDERED A JUDGMENT THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT OR EIGHTH CIRCUIT PRECEDENT?

IV.

WHETHER GENUINE ISSUES OF MATERIAL FACTS EXIST WHICH PRECLUDE SUMMARY JUDGMENT IN THIS CIVIL RIGHTS ACTION?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	5
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	9
STATEMENT OF THE CASE	10
REASONS WHY THE WRIT SHOULD BE GRANTED	29
CONCLUSION	48
APPENDIX	50
CERTIFICATE OF SERVICE	53
ENTRY OF APPEARANCE	55

TABLE OF AUTHORITIES

PAGE

Cases:

Boulware vs. Battaglia
344 F.Supp 889,at 890
affirmed C.A.3d, 1973
478 F.2d 1398---------- 38

Boyce vs. Grundy
3 Pet. 210---------- 34

Boyce vs. School Dist. of Phila.
447 F.Supp 357, at 358
(D.C. Pa, 1978)------- 39

Federal Trade American Commission vs. Tobacco Co.
274 U.S. 543, at 544
71 L.Ed 1193
47 S.Ct. 663---------- 33

Haines vs. Kerner
404 U.S. 519, 520
521 (1972)------- 35, 36

Lashee vs. Sumner
570 F.2d 107, at 108
(C.A. 6th, 1978)-------- 38, 42

Laymon vs. McComb
524 F.Supp 1091
(D.C. Colo 1981)-------- 40

McClain vs. Meier
612 F.2d 349, 356
(8th Cir, 1979)--------- 47

Miranda vs. Arizona
384 U.S. at 494---------- 35

Nudd vs. Burrows
91 U.S. 286, at 290------- 35

	PAGE
Perry vs. Sindermann 408 U.S. 593, at 598 92 S.Ct. 2694 33 L.Ed. 2d 570---------	34
Rawls vs. Daughters of Charity of St. Vincent De Paul, Inc. 491 F.2d 141, 142 (C.A. 5th, 1974) certiorari denied 95 S.Ct. 513 419 U.S. 1032 42 L.Ed. 2d 307---------	39
Smith vs. Vulcan Iron Works 165 U.S. 518 41 L.Ed. 810 17 S.Ct. 407----------	32
Sperry vs. Barggren 523 F.2d 708, at 709 (C.A. 7th)----------	37, 41
State vs. Baldwin 10 N.W. 645, at 647 57 Iowa 266 (1881)------	42 44
U.S. vs. Throckmorton 98 U.S. 93, at 95-------	35

Constitution, Statutes, Rules and Regulations: PAGE

Constitution of the United States of America:

Fifth Amendment--------9, 12
Fourteenth Amendment----------9, 12

Civil Rights Act of 1964----10, 16

Title 28, U.S.C.,
Section 1291----------7
Section 1294----------7
Section 1295----------7
Section 1343(3)----------9, 11
Section 2101(c)----------i, 5, 6
Section 2101(e)----------5
Title 42, U.S.C.,
Section 1500(c)----------9
Section 1982----------9, 11
Section 1983----------9, 11
Section 1985----------9, 10, 11
Section 1986----------10, 11
Section 5305(a)(2)-------10
Supreme Court Rules
Rule 17----------5, 6, 28
Rule 18----------5, 6, 28, 30
Rule 20.6----------6
Rule 43----------6
Federal Rules of Appellate Procedure
Rule 3----------7
Rule 4----------7
Rule 26(c)----------i, 23, 29, 30
Rule 40(a)----------i, 24, 29

PAGE

Rules of the United States Court of Appeals for the Eighth Circuit

Rule 1----------7
Rule 12(a)----------22

Federal Rules of Civil Procedure

Rule 56(e)----------10, 36

Code of Federal Regulations

Title 24----------13

Code of Iowa (1966)
Chapter 472
Section 472.20----------15
Section 472.21----------46

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner MOSE KOREY, Pro Se, respectfully prays that a Writ of Certiorari issue to review the Actions of the Clerk of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 15,

1985, and to review subsequent Actions by said Clerk; and to review the Ruling and Order Granting Defendant's Motion for Summary Judgment, entered on April 12, 1985, and Order Denying Motion to Reconsider, entered May 8, 1985, both Orders entered by W. C. Stuart, Chief Judge of the United States District Court for the Southern District of Iowa.

OPINIONS BELOW

The Order of the Eighth Circuit Court of Appeals, allegedly filed on August 15, 1985, but unsigned by any Judge of the Eighth Circuit Court of Appeals, and unsigned by anyone else, by which Petitioner's Appeal from the Judgment of the United States District Court for the Southern District of Iowa was summarily disposed of, which is not

reported, is set out at pp. A-16 to A-18 of the Appendix. The response of the Eighth Circuit Court of Appeals, dated September 19, 1985, but also unsigned by anyone, by which Petitioner's Petition for Rehearing by Panel was denied on the basis of untimely filing, which is not reported, is set out at pp. A-19, A-20 of the Appendix.

The mandate of the Eighth Circuit Court of Appeals, dated August 15, 1985, signed by the Clerk of the Eighth Circuit Court of Appeals, but unsigned by any Judge of the Eighth Circuit Court of Appeals, which is not reported, is set out at pp. A-21 of the Appendix.

The letter Re: Motion to Correct Error, dated October 11, 1985, but unsigned by any Judge of the Eighth

Circuit Court of Appeals, which is not reported, is set out at pp. A-22, A-23 of the Appendix.

The letter Re: No. 85-1669SI Mose Korey v. City of Davenport, Iowa, dated November 6, 1985, which letter ignored Petitioner's Application for Review by the Court, mailed October 18, 1985, but also which letter was unsigned by any Judge of the Eighth Circuit Court of Appeals, which is not reported, is set out at pp. A-24, A-25 of the Appendix.

The Ruling and Order Granting Defendant's Motion for Summary Judgment, of the United States District Court for the Southern District of Iowa (CIVIL NO. 83-174-D-1), entered April 12, 1985, which is not reported, is set out at pp. A-24, A-25 of the Appendix.

The Order Denying Motion to

Reconsider, of the United States District Court for the Southern District of Iowa (CIVIL NO. 83-174-D-1), entered May 8, 1985, which is not reported, is set out at pp. A-12 to A-15 of the Appendix.

JURISDICTION

The jurisdiction of the Supreme Court of the United States on Petitioner's Petition for Writ of Certiorari is invoked pursuant to Title 28, United States Code, Section 2101(c) or 2101(e), as the facts are deemed appropriate, and Supreme Court Rules 17.1(a) and 17.1(c) or 18, as the facts are deemed appropriate.

The jurisdiction of the Supreme Court of the United States on Petitioner's Application to Circuit Justice Blackmun for Extension of Time Within Which to File a Petition

for Writ of Certiorari is invoked pursuant to Title 28, U.S.C.,Section 2101(c), and Supreme Court Rules 17, 18, 20.6 and 43.

The Order Extending Time To File Petition for Writ of Certiorari was signed by Associate Justice Harry A. Blackmun, dated November 9, 1985, File No. A-357.

The Order of the United States District Court for the Southern District of Iowa, granting Defendant's Motion for Summary Judgment, was entered on April 12, 1985, and the Order Denying Motion to Reconsider was entered May 8, 1985 (CIVIL NO. 83-174-D-1).

Petitioner is seeking a review of the above Orders by the United States

District Court for the Southern District of Iowa.

Petitioner's Notice of Appeal was filed on May 10, 1985, and Brief for the Appellant was timely filed on July 31, 1985.

The jurisdiction of the Eighth Circuit Court of Appeals was invoked pursuant to Title 28, U.S.C., Sections 1291, 1294 and 1295; Federal Rules of Appellate Procedure, Rules 3 and 4; and the Eighth Circuit Rules of Appellate Procedure, Rule 1.

Petitioner is seeking a review of the following documents sent to him by the Clerk's Office of the Eighth Circuit Court of Appeals, which documents are presented as judgments of the Eighth Circuit Court of Appeals, yet have no signature of any

Judge of the Eighth Circuit Court of Appeals affixed to any document included among them (85-1669-SI):

1. Letter and Order, dated August 15, 1985;
2. Letter and Document, dated September 19, 1985;
3. Letter dated October 3, 1985, transmitting mandate of the Court;
4. Letter Re: Motion to Correct Error, dated October 11, 1985;
5. Letter Re: No. 85-1669SI Mose Korey v. City of Davenport, Iowa, dated November 6, 1985.

The jurisdiction of the United States District Court for the Southern District of Iowa, which was the Court of first instance, in the original Complaint, (CIVIL NO. 83-174-D-1),

filed October 21, 1983, was invoked under Title 28, U.S.C., Section 1343(3) and Title 42, U.S.C., Sections 1982, 1983, 1985, 1986 and 1500(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Because the provisions involved are lengthy, Petitioner herewith gives the citations which are involved, and sets forth their pertinent verbatim texts in the Appendix at the designated pages:

1. Constitution of the United States of America:

   Fifth Amendment, pp.A-68
   Fourteenth Amendment, pp.A-68, A-69

2. Title 42, U.S.C.:

   Section 1500(c), pp.A-69, A-70

   Section 1982, pp. A-70

   Section 1983, pp.A-70, A-71

   Section 1985, pp.A-71, A-72

Section 1986, pp. A-72

Section 5305(a)(2),

pp. A-73

3. Federal Rules of Civil Procedure, Rule 56(e), Notes of Advisory Committee on Rules, 1963 Amendment, pp. A-73 .

STATEMENT OF THE CASE

Petitioner, MOSE KOREY, Pro Se, adult, native born citizen of the United States, who is a member of a minority class of citizens protected by the Civil Rights Act of 1964, as amended, filed a 31-page Complaint against the City of Davenport, Iowa, on October 21, 1983, for alleged illegal and unconstitutional action of Defendant City in connection with various (alleged) condemnations of Petitioner's real

property in a manner which violated Petitioner's Federally protected rights.

Petitioner alleged violations of his Constitutional rights under color of State law, custom and usage; conspiracy to violate his Constitutional rights under color of State law, custom and usage; and failure to protect from conspiracy to violate his Constitutional rights under color of State law, custom and usage.

The jurisdiction of the United States District Court for the Southern District of Iowa, which was the Court of first instance (CIVIL NO. 83-174-D-1), was invoked pursuant to the provisions of Title 28, U.S.C., Section 1343(3), this being a suit at law which is authorized by law, Title 42, U.S.C., Sections 1982, 1983, 1985 and 1986, to

enforce his protected minority rights, under the 5th and 14th Amendments to the Constitution of the United States of America.

Petitioner further requested that the eminent domain proceedings complained of be annulled and set aside on the grounds that:

a. Valid condemnation proceedings had not been initiated:

(1) Petitioner alleged that all valid condemnation proceedings ceased upon the issuance of and service upon Defendant City of a Temporary Restraining Order, dated and served on June 9, 1969. (Cause No. 51298).

(2) Because of the aforesaid Temporary Restraining Order, the Sheriff and alleged Commission acted illegally and in excess of their subject-matter jurisdiction and with-

out color or right to condemn.

(3) Defendant City acted in violation of HUD Rules and Regulations governing the procedures by which recipients of HUD funds were to acquire real property, as found in Title 24, Code of Federal Regulations, and in other Federal law.

(4) That the records of the alleged condemnation proceedings shows evidence of fraud and conspiracy on the part of Defendant City, the Office of the Sheriff of Scott County, Iowa, and other parties unknown, and consequent failure to protect Petitioner from said conspiracy.

(5) That the said record does not show:

(A) Proof of Service of Notice of Condemnation in the same

manner as original notices, as required by the Code of Iowa;

(B) any valid original signature of the Sheriff of Scott County, Iowa, or of his authorized Deputy, on the document which purportedly shows the Appointment of Commissioners;

(C) that either the Sheriff or his Deputy signed a receipt for remittance, or its disposition, if any, from the City for alleged Deposit of Amount of Damages.

(6) That the Sheriff's Certificate, as found in the record of these proceedings complained of, was, through conspiracy, by parties unknown, falsely, illegally and fraudulently prepared and backdated to June 10, 1969, as evidenced by the fact that

the year 1971 was struck through and altered and replaced by the year 1969. The [illegible]ity, illegality and fraudulence of the Sheriff's Certificate is further evidenced by the fact that Petitioner's attorney filed Notice of Appeal on July 1, 1969, and that if the Sheriff's Certificate had been filled out at the time and certified in compliance with Section 472.20 of the Code of Iowa, 1966, it would have been dated subsequent to July 1, 1969, and it would not have had the year 1971 on it to have been struck through and altered to 1969.

Petitioner further alleged that the acts of Defendant City, as shown by the record, amounted to an evasion of the obligations imposed upon it by the provisions of Constitution and

statute, as a condition precedent to its exercise of the power of eminent domain.

Petitioner further alleged that Defendant City should not be allowed to escape the consequences of its illegal, unconstitutional and oppressive acts and violations of Petitioner's civil rights by claiming the Petitioner has had his day in Court, or that the Federal Court should abstain from protecting the rights of a minority citizen under the Civil Rights Act. To concur with such probable claims by Defendant City would be to defeat the entire purpose of the Civil Rights Act, i.e. to give the citizen resort to the Federal Court for a redress of wrongs committed under the guise of state law.

Petitioner stated that the gravamen of Petitioner's complaint is not to allege a common law tort of trespass and conversion. The gravamen is to allege an unlawful taking of Petitioner's property under the guise of authority conferred to Defendant City by the laws of the State of Iowa in violation of statutory due process, by abuse of process, abuse of power, and in violation of a Temporary Restraining Order of the Iowa District Court in Scott County. (Cause No. 51298)(See Appendix pp.A-26 thru A-34).

Petitioner alleged various acts by Defendant City which constituted "takings" without benefit of condemnation proceedings, in further violation of Federally "protected property rights" as a result of the alleged condemnation.

Petitioner further alleged that without judicial redress in the Federal Court, Petitioner would be helpless, and the apparent security of the Constitution and statutes become, so far as he and his property are concerned, a mere pretense without practical meaning or effect.

Thereupon Defendant City did ANSWER the Complaint and assert a number of Affirmative Defenses and prayed that the Complaint be dismissed. Petitioner thereupon submitted Resistance to Defendant City's ANSWER and Prayer for Dismissal. The prayer was not acted upon by the U.S. District Court at that time.

After Interrogatories were submitted and answered both by Petitioner and Defendant,

Defendant City filed a Motion for Summary Judgment on June 18, 1984.

On July 27, 1984, Petitioner filed Resistance to Defendant City's Motion for Summary Judgment, accompanied by Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment, and Memorandum of Points and Authorities, with Exhibits, including Petitioner's Exhibit No.4: Notice to Defendant of Order to Show Cause, filed June 9, 1969 (initiating Petitioner's Cause No. 51298 opposing the prospective Condemnation proceedings), set forth in Appendix at pp. A-26 thru A-29 ; Order for Hearing on Temporary Injunction, filed June 9, 1969, set forth in Appendix at pp. A-30, A-31 ; Order for Temporary Injunction, filed June 9 and June 11,

1969, set forth in Appendix at pp. A-32, A-33 ; Sheriff's Return on Order served June 9, 1969, on Allyn Wiese, City Clerk, filed June 11, 1969, set forth in Appendix at pp. A-34 ; and Defendant's Answer to Interrogatories, No. 2, set forth in Appendix at pp. A-35, A-36 .

Because of health problems, Petitioner had filed Application for Stay on November 30, 1984, in which he stated that he had been hospitalized on November 4, 1984, and was under doctor's care, which Application was not ruled upon at that time.

On April 12, 1985, a Ruling and Order Granting Defendant's Motion for Summary Judgment was entered by W.C. Stuart, Chief Judge, Southern District of Iowa, set forth in Appendix at pp. A-2 thru A-11 .

Petitioner wrote a letter to the Honorable William C. Stuart, dated April 30, 1985, in which he referred to his failing physical condition and enclosed a letter from his personal physician, Dr. John F. Collins, dated April 29, 1985, stating that Petitioner "is unable to proceed with court action at the present time" due to Petitioner's state of health, set forth in Appendix at pp. A-1 .

Judge W.C. Stuart then treated said letter as a Motion to Reconsider and issued Order Denying Motion to Reconsider, entered May 8, 1985, set forth in Appendix at pp. A-12 thru A-15.

Petitioner filed Notice of Appeal on May 10, 1985.

Petitioner's Brief for the Appelant was timely filed on July 31, 1985.

On August 15, 1985, a letter, signed by Michael E. Gans, Chief Deputy Clerk, Eighth Circuit Court of Appeals, transmitting a "copy of an order entered by us today at the direction of the Court" was sent to Petitioner. The enclosed Order was not signed by any Judge of the Eighth Circuit Court of Appeals, nor was it signed, or attested, by anyone. The Order indicated that, pursuant to Eighth Circuit Rule 12(a), the Court was summarily disposing of the Appeal by Affirming the Ruling of the Court below. Of course, there was no opinion rendered, but neither was there any kind of document sent to Petitioner to which any Judge's signature was affixed. The said Order also had the words "Filed August 15, 1985" typed on it.

These facts set up a critical

uncertainty, controversy and dilemma: On the one hand, if the said Order is deemed to be a valid Order, then it must be considered as a final judgment by the Eighth Circuit Court of Appeals and the ninety-day period in which Petitioner can Petition the United States Supreme Court for a Writ of Certiorari to the Eighth Circuit Court of Appeals would then commence to count; on the other hand, Petitioner then prepared and sent a Petition for Rehearing by Panel which was placed in the U.S. mail on August 28, 1985, with a Certificate of Service attached, and which was received and filed by the Clerk of the Appellate Court on August 30, 1985. Since the Federal Rules of Appellate Procedure, Rule 26(c), allow an additional 3 days to the prescribed period, and the Local Rules of the

Eighth Circuit, which Petitioner had asked for and had received, do not say any different, it is Petitioner's position that his Petition for Rehearing by Panel was timely filed pursuant to FRAP Rule 40(a); in which case the ninety-day period would begin to count from the date that the Appellate Court entered a Ruling on Petitioner's Petition for Rehearing by Panel.

However, on September 19, 1985, a letter, signed by Linda L. Penberthy, Senior Deputy Clerk, transmitting a "copy of order entered today at the direction of the Court" was sent to Petitioner. The enclosed document was not titled "Order", nor was it given any title, nor was it signed by any Judge of the Eighth Circuit Court of Appeals, nor was it signed, or attested, by anyone. The document stated

that "appellant's petition for rehearing is denied by the Court on the basis of untimely filing."

Again, there was no opinion rendered by the Judges, but neither was there any kind of document sent to Petitioner to which any Judge's signature was affixed, nor was it indicated in any way that the said document was filed.

On October 7, 1985, Petitioner mailed a Motion to Correct Error, requesting that the extra three days be recognized as acceptable and that a rehearing be docketed and heard by the Court.

On October 11, 1985, a letter was sent to Petitioner, signed by Linda L. Penberthy, Senior Deputy Clerk, in which she repeated her claim that Petitioner's Petition for Rehear-

ing by Panel had not been timely filed, and included the statement "The three-day mailing privilege is not extended to petitions for rehearing, at least by this Circuit." Here again, there was no document presented to Petitioner which was signed by any Judge of the Eighth Circuit Court of Appeals.

Petitioner then mailed Application for Review by the Court on October 18, 1985, on the basis of his being adversely affected by the above mentioned Actions by the Clerk of Court, and which were unaccompanied by any valid signature of a Judge of the Eighth Circuit Court of Appeals.

On November 6, 1985, a letter was sent to Petitioner by Robert St. Vrain, Clerk of Court, in which he stated that Petitioner's case was properly handled by his office, and that the appeal was

officially concluded with the issuance of the Appellate Court's mandate on October 3, 1985. No direct response was made to Petitioner's said Application for Review by the Court. Said letter of November 6, 1985, is set forth in the Appendix on pp. A-24, A-25 .

These facts set up additional critical uncertainty, controversy and dilemma: On the one hand, Petitioner is taking the position that his original Brief for Appellant, filed July 31, 1985, has not been responded to, nor acted upon, by any Judge, therefore there is, as yet, no final judgment from which to start counting 90-days in which to Petition for Writ of Certiorari; on the other hand, if the Judges of the Eighth Circuit Court of Appeals fail and/or refuse to affix

their signatures to any document, and take the position that August 15, 1985 is the proper date of final judgment, then Petitioner is compelled to rely on Supreme Court Rule 18 as the basis for submitting his Petition for Writ of Certiorari because he does not accept the Actions of the Clerk of Court as representing final judgment by the Eighth Circuit Court of Appeals.

So Petitioner is submitting his Petition for Writ of Certiorari pursuant to both Rule 17 and 18, Supreme Court Rules, as the facts are deemed appropriate, so that there will be no question as to whether it is timely filed.

REASONS WHY THE WRIT SHOULD BE GRANTED

The reasons why Petitioner believes that the writ should be granted are organized in what Petitioner believes to be the proper priority of the Questions Presented For Review.

I.

A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT PRACTICE IN ALLOWING, OR DISALLOWING THE THREE (3) ADDITIONAL DAYS PERMITTED BY FRAP 26(c) IN FILING THE PETITION FOR REHEARING PERMITTED BY FRAP 40(a)

1. Since it is Petitioner's position that his Petition for Rehearing by Panel, which was mailed on August 28, 1985 and filed August 30, 1985, was timely filed pursuant to FRAP 26(c), Petitioner believes that Certiorari should be granted, pursuant

to Supreme Court Rule 18, so that the Eighth Circuit can provide the Supreme Court with the order or local rule by which the Eighth Circuit has chosen to modify the three (3) additional days permitted by FRAP 26(c), and also to explain to the Court why Petitioner was not provided with a copy of same, if there is one, when Petitioner had requested and received a copy of the local Rules of the United States Court of Appeals for the Eighth Circuit.

B. CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT'S ACTIONS TO MAKE A DETERMINATION AS TO WHETHER A FINAL JUDGMENT HAS BEEN RENDERED BY THE EIGHTH CIRCUIT ON PETITIONER'S APPEAL FROM THE JUDGMENT OF THE U.S. DISTRICT COURT BELOW.

1. Petitioner has received no document upon which the signature of any Judge of the Eighth Circuit is

affixed to indicate in any way that a final judgment has been rendered by any Judge, particularly by a three-Judge panel.

2. If Petitioner's Petition for Rehearing by Panel, filed August 30, 1985, is deemed to be timely filed, then Petitioner has received no final judgment on that Petition.

3. Petitioner's Application for Review by the Court, mailed October 18, 1985, has not been officially responded to by the Court.

4. It is Petitioner's position that Petitioner's substantial rights have been adversely affected by the

actions herein referred to[1/] and that no final judgment has been rendered by the Eighth Circuit Court of Appeals on Petitioner's Appeal from the judgment of the U.S. District Court below.

II.

A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE EIGHTH CIRCUIT PRACTICE OF NOT PROVIDING APPELLANTS WITH COPIES OF DOCUMENTS, PURPORTING TO MAKE FINAL DISPOSITION OF APPEALS, WHICH WOULD SHOW BY THE SIGNATURES OF THE JUDGES AFFIXED UPON THEM, THAT THEY DID, IN FACT, MAKE A RULING ON APPELLANTS' APPEALS.

1. Petitioner believes that the future administration of a fair and honest appellate system depends upon

---

1/ ....Certiorari will not issue to review a decision of a Circuit Court of Appeals where the matter complained of does not effect the substantial rights of the parties.

Smith vs. Vulcan Iron Works, 165 U.S. 518, 41 L.Ed 810, 17 S.Ct. 407.

the Appellant being provided with documents which clearly show that the Panel saw, and rendered judgment upon, his Appeal[2/]; so that Appellant would know that his Appeal, if denied, at least was denied by Judges whose names were on record; which would provide a clear date from which to start counting the time period within which to Petition the Supreme Court for a Writ of Certiorari; and, above all, which would show that some

---

2/ That the future administration of the law might be seriously hindered by the judgment and opinion sought to be reviewed is sufficient reason for granting the writ.

Federal Trade Commission vs. American Tobacco Company

274 U.S. 543, at 544
71 L.Ed 1193
47 S.Ct. 663

Judges had acted on his Appeal, rather than an obscure and un-named Law Clerk, or Clerk of Court, or Deputy Clerk, which issues Petitioner understands are also being raised by others.

III.

A. IN THE EVENT THAT IT IS DEEMED THAT FINAL JUDGMENT BY THE APPELLATE COURT HAS BEEN ENTERED, CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT RENDERED A JUDGMENT THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT PRECEDENT.

1. When his allegations plainly presented a bona fide constitutional claim, without full exploration of the issues involved, [summary judgment] was improper.

Perry vs. Sindermann
408 U.S. 593, at 598
92 S.Ct. 2694
33 L.Ed. 2d 570

2. Fraud vitiates everything.

Boyce vs. Grundy
3 Pet. 210

3. Fraud destroys the validity of everything into which it enters.

Nudd vs. Burrows
91 U.S. 286, at 290

4. Fraud vitiates the most solemn contracts, documents and even judgments.

U.S. vs. Throckmorton
98 U.S. 93, at 95

5. Where rights secured by the Constitution are concerned there can be no legislation or rule making that can abrogate them.

Miranda vs. Arizona
384 U.S. at 494

6. A motion to dismiss cannot be used to deny plaintiff's access to the federal courts.

Haines vs. Kerner
404 U.S. 519, 520, 521 (1972)

Petitioner asserts that the effect of the U.S. District Court's action was for the Court to have treated Defendant's Motion for Summary Judgment as a Motion to Dismiss, which

had previously been submitted by Defendant City but which had not previously been acted upon by the U.S. District Court, thus ignoring the ruling of Haines vs Kerner, and thus to deny Petitioner his right to a jury trial on the merits of his case.

7. Petitioner asserts that the ruling of the U.S. District Court did directly conflict with the Rules of Civil Procedure, Rule 56(e), Notes of Advisory Committee on Rules, 1963 Amendment, last paragraph,[3/] thereby conflicting directly with U.S. Supreme Court precedent.

3/ Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

B. IN THE EVENT THAT IT IS DEEMED THAT FINAL JUDGMENT BY THE APPELLATE COURT HAS BEEN ENTERED, CERTIORARI SHOULD BE GRANTED BECAUSE THE APPELLATE COURT RENDERED A JUDGMENT THAT DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS OF THE COURTS OF APPEALS.

1. Whether the alleged fraud..... was concealed or was of such a nature as to conceal itself, thus tolling the statute of limitations until the minority shareholders had obtained knowledge of the fraud or, in the exercise of due care, should have obtained that knowledge, whether the knowledge could have been reasonably acquired three years prior to the filing of the complaint, and whether a fiduciary relationship existed between the parties so as to have had the effect of lessening the duty of inquiry on the part of the minority shareholders were questions of fact precluding summary judgment.

Sperry vs. Barggren
523 F. 2d 708 (C.A. 7th)
at 709

2. A material fact issue existed whether defendant deliberately and fraudulently concealed an allegedly libelous report from plaintiff, thereby tolling the Kentucky one-year limitations period, precluding summary judgment for defendant.

Lashee vs. Sumner at 108
570 F. 2d 107 (C.A. 6th, 1978)

3. In cases raising federal constitutional claims, a court must rigorously insure against granting summary judgment when any doubt exists concerning disputed material facts.

Boulware vs. Battaglia
344 F. Supp 889, at 890
affirmed C.A. 3d, 1973,
478 F. 2d 1398

IV.

A. CERTIORARI SHOULD BE GRANTED BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTS WHICH PRECLUDE SUMMARY JUDGMENT IN THIS CIVIL RIGHTS ACTION.

1. ....material issues of fact regarding the voluntariness of plaintiff's initial entry into the hospital and whether the hospital correctly relied

on an improper court order in detaining plaintiff precluded the entry of summary judgment for plaintiff prior to trial.

Rawls vs. Daughters of Charity of St. Vincent De Paul, Inc.
491 F. 2d 141 (C.A. 5th, 1974)
certiorari denied at 142
95 S.Ct. 513
419 U.S. 1032
42 L. Ed. 2d 307

2. Petitioner would relate the question of whether Defendant City incorrectly ignored a proper Temporary Restraining Order to this case, as constituting a material issue of fact, precluding the entry of summary judgment.

3. ....that true reasons for her dismissal were concealed from her until a later time, raising question of fraudulent concealment doctrine and, given this posture of case, claim would not be dismissed at this time as time barred.

Boyce vs. School Dist. of Phila.
447 F. Supp. 357(D.C.Pa.1978)
at 358

4. Petitioner asserts that the question of whether the alleged fraudulent absence of certain documents in the record of condemnation proceedings on the part of Defendant City was of such a nature as to conceal itself, thus tolling the statute of limitations was a question of fact precluding summary judgment.

5. Even if the securities fraud action including a claim for breach of fiduciary duties was governed by the three-year fraud statute of limitations, rather than the five-year statute of limitations, the issue of when plaintiffs discovered the allegedly fraudulent transfer that was the breach of fiduciary duty was a genuine issue of fact, precluding summary judgment.

Laymon vs. McComb
524 F. Supp. 1091
(D.C.Colo. 1981)

6. Petitioner asserts that the alleged fraud and fraudulent concealment of Petitioner's Complaint was of such a nature as to conceal itself, thus tolling the statute of limitations, which statute of limitations the U.S. District Court stated as the basis for claiming not to have jurisdiction.4/

7. Petitioner asserts that whether the knowledge of the alleged fraud and fraudulent concealment could have been reasonably acquired sooner than it was, and the extent to which the fiduciary relationship between Defendant City and Petitioner

---

4/ See Sperry vs. Barggren 523 F. 2d 708 (C.A.7th) supra.

would have the effect of lessening the duty of inquiry on the part of Petitioner were questions of fact precluding summary judgment.[5/]

8. Petitioner asserts that a material fact issue exists whether Defendant City deliberately and fraudulently concealed the existence of allegedly falsely, illegally and fraudulently prepared and backdated records of the alleged condemnation proceedings, thereby tolling the statute of limitations.[6/]

5/ See Sperry vs Barggren 523 F. 2d 708 (C.A.7th) supra.

6/ See Lashee vs. Sumner 570 F. 2d 107 (C.A. 6th, 1978) supra.

B. CERTIORARI SHOULD BE GRANTED BECAUSE DEFENDANT CITY IGNORED A VALID TEMPORARY RESTRAINING ORDER, WHICH FACT THE U.S. DISTRICT COURT IGNORED, THAT THEREFORE THERE WAS NO "VALID GOVERNMENTAL ACTION" WHICH THE U.S. DISTRICT COURT ASSUMED TO EXIST, AS A BASIS FOR ITS RULING THAT NO "PROTECTED PROPERTY RIGHT" HAS BEEN INFRINGED.7/

1. Petitioner asserts that there was a valid Temporary Restraining Order in effect, which was violated by Defendant City on June 10, 1969. Petitioner further asserts that all valid condemnation proceedings ceased upon the issuance of and the service upon Defendant City of a Temporary Restraining Order, dated and served

---

7/ See p. 2 of Ruling and Order Granting Defendant's Motion for Summary Judgment. (Appendix p. A-5)

upon Defendant City on June 9, 1969.

(Cause No. 51298, District Court, Scott County, Iowa).[8/]

2. In injunction proceedings the order of a court having jurisdiction of the matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed.

State vs. Baldwin
10 N.W. 645, at 647
57 Iowa 266 (1881)

8/ See Plaintiff's Exhibit 4, included with Plaintiff's Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment, filed July 27, 1984, which Exhibit 4 includes: Notice to Defendant of Order to Show Cause, filed June 9, 1969; Order for Hearing on Temporary Injunction, filed June 9, 1969; Sheriff's Return on Order served June 9, 1969, on Allyn Weise, City Clerk, filed June 11, 1969; all in connection with Cause No. 51298. (Appendix A-26 through A-34)

C. CERTIORARI SHOULD BE GRANTED BECAUSE JUDGE W. C. STUART HAD PROPERLY STATED THE REASONS WHY THE PRINCIPLE OF "RES JUDICATA" SHOULD NOT APPLY TO SIMILAR CIVIL RIGHTS SUITS, IN HIS OWN COURT ORDER, ENTERED JULY 6, 1981,[9/] WHICH REASONS HE IGNORED IN HIS RULING AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ENTERED APRIL 12, 1985, (MOSE KOREY VS. CITY OF DAVENPORT, IOWA, CIVIL NO. 83-174-D-1).

1. Petitioner asserts that Judge W. C. Stuart properly recognized, on page 5 of his Order, that:

> However, the constitutional questions raised in Division IV of the Shoemaker's state law complaint were not properly before the state district court, and thus could not have been actually or necessarily disposed of in

---

9/ United States District Court for the Southern District of Iowa, Shoemaker vs. City of Muscatine, Iowa, CIVIL NO. 78-112-D and Pape vs. City of Muscatine, Iowa, CIVIL NO. 78-113-D (See Appendix pp. A-58, A-59)

> that court.....the state court's subject matter jurisdiction was restricted pursuant to Section 472.21 of the Code to a determination of the propriety of the amount of damages assessed by the condemnation commission..... Therefore, since the claims pending before this Court could under no circumstances have been entertained by the state district court, the principle of res judicata does not foreclose plaintiff's right to pursue such claims herein.

2. Petitioner further asserts that Judge W.C. Stuart reversed his position and ruled the opposite in Petitioner's case, whereas the same principle applies.

D. CERTIORARI SHOULD BE GRANTED BECAUSE JUDGE W.C. STUART REVERSED HIS POSITION GIVEN IN HIS ORDER, ENTERED JULY 6, 1981,[10/] RELATIVE TO MOTION FOR SUMMARY JUDGMENT.

10/ (See 9/ supra)
(See Appendix pp. A-48 thru A-50)

1. Petitioner further asserts that in the same Order, entered on July 6, 1981, Judge W.C. Stuart properly stated the following, on p.2, Re: Motion for Summary Judgment):

> The Court must assess the facts in the light most favorable to the nonmovant and the latter must be afforded the benefit of all favorable inferences which may be derived from the underlying facts as revealed in the pleadings, depositions and affidavits filed therein.

McClain vs. Meier
612 F. 2d 349, 356
(8th Cir., 1979)
(See Appendix p. A-50)

CONCLUSION

Certiorari should be granted to resolve the questions left unanswered by the Actions of the Clerk of Court of the Eighth Circuit Court of Appeals. The opinion of the U.S. District Court for the Southern District of Iowa is in conflict with Supreme Court precedent, other Circuit Court of Appeals precedent and in conflict, even, with its own previous decision.

Respectfully submitted,

Mose Korey

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

VERIFICATION

I, MOSE KOREY, being first duly sworn, state and depose that I have read the foregoing PETITION FOR WRIT OF CERTIORARI, that I am familiar with it's content, and that I understand it and swear that everything therein is true and correct to the best of my information, personal knowledge and belief.

Mose Korey
MOSE KOREY

Subscribed and sworn to before me on this 4th day of December, 1985.

Dawn L. Helfrich
NOTARY PUBLIC

APPENDIX

	PAGE
Letter, Dr. John F. Collins, dated April 29, 1985	A-1
Ruling and Order Granting Defendant's Motion for Summary Judgment, entered April 12, 1985	A-2 , A-3 A-4 , A-5 A-6 , A-7 A-8 , A-9 A-10, A-11
Order Denying Motion to Reconsider, entered May 8, 1985	A-12, A-13 A-14, A-15
Letter and Order, dated August 15, 1985	A-16, A-17 A-18
Letter and Document, dated September 19, 1985	A-19, A-20
Letter dated October 3, 1985, transmitting mandate of the Court	A-21
Letter and enclosure Re: Motion to Correct Error, dated October 11, 1985	A-22, A-23
Letter dated November 6, 1985	A-24, A-25
From Plaintiff's Exhibit 4, as filed with: Plaintiff's Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment (CIVIL NO. 83-174-D-1)	

	PAGE
Notice to Defendant of Order to Show Cause (Cause No. 51298) filed June 9, 1969;	A-26, A-27 A-28, A-29
Order for Hearing on Temporary Injunction (Cause No. 51298) filed June 9, 1969;	A-30, A-31
Order for Temporary Injunction (Cause No. 51298) filed June 11, 1969 after being served by Sheriff, Scott County, Iowa;	A-32, A-33
Sheriff's Return on Order served June 9, 1969, on Allyn Wiese, City Clerk, filed June 11, 1969 (Cause No. 51298);	A-34
Defendant's Answer to Interrogatories, No.2 (CIVIL NO. 83-174-D-1)	A-35, A-36
United States District Court for the Southern District of Iowa (CIVIL NO. 78-112-D) (CIVIL NO. 78-113-D)	
Ruling and Order, filed April 25, 1980	A-37, A-38 A-39, A-40 A-41, A-42 A-43, A-44 A-45

	PAGE
Order, filed July 6, 1981	A-46, A-47 A-48, A-49 A-50, A-51 A-52, A-53 A-54, A-55 A-56, A-57 A-58, A-59 A-60, A-61 A-62, A-63 A-64, A-65 A-66, A-67

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

CERTIFICATE OF SERVICE

This is to certify that the undersigned did on this 5th day of December, 1985, deposit in the U.S. Mail, postage prepaid for delivery by first class mail to the following addresses:

1. Mr. Alexander L. Stevas, Clerk
United States Supreme
Court Building
1 First Street, N.E.
Washington, D.C. 20543

forty-three (43) copies of:

PETITION FOR WRIT OF CERTIORARI
ENTRY OF APPEARANCE

for filing, of which three (3) copies are to be returned to Petitioner after filing.

2. Patricia Rhodes Cepican
3432 Jersey Ridge Road
Davenport, Iowa 52807

three (3) copies of same document.

I further certify that, in compliance with Supreme Court Rule 28.5(c), all parties required to be served have been served.

Mose Korey

MOSE KOREY

Subscribed and sworn
to before me on this
4th day of December,
1985.

Dawn L. Helfrich

NOTARY PUBLIC

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ENTRY OF APPEARANCE

COMES NOW, MOSE KOREY, and hereby enters his appearance on behalf of himself, representing himself, Pro Se, as Petitioner in the above captioned case.

Mose Korey

MOSE KOREY
3026 Belle Avenue
Davenport, Iowa 52803

85-978 (7)

NO._____

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

BEST AVAILABLE COPY

85 PP

APPENDIX

	PAGE
Letter, Dr. John F. Collins, dated April 29, 1985	A-1
Ruling and Order Granting Defendant's Motion for Summary Judgment, entered April 12, 1985	A-2, A-3 A-4, A-5 A-6, A-7 A-8, A-9 A-10, A-11
Order Denying Motion to Reconsider, entered May 8, 1985	A-12, A-13 A-14, A-15
Letter and Order, dated August 15, 1985	A-16, A-17 A-18
Letter and document, dated September 19, 1985	A-19, A-20
Letter dated October 3, 1985, transmitting mandate of the Court	A-21
Letter and enclosure Re: Motion to Correct Error, dated October 11, 1985	A-22, A-23
Letter dated November 6, 1985	A-24, A-25
From Plaintiff's Exhibit 4, as filed with: Plaintiff's Affidavit of Material Facts in Support of Resistance to Defendant's Motion for Summary Judgment (CIVIL NO. 83-174-D-1)	

	PAGE
Notice to Defendant of Order to Show Cause (Cause No. 51298) filed June 9, 1969;	A-26, A-27 A-28, A-29
Order for Hearing on Temporary Injunction (Cause No. 51298) filed June 9, 1969;	A-30, A-31
Order for Temporary Injunction (Cause 51298) filed June 11, 1969 after being served by Sheriff, Scott County, Iowa	A-32, A-33
Sheriff's Return on Order served June9, 1969, on Allyn Wiese, City Clerk, filed June 11, 1969 (Cause No. 51298)	A-34
Defendant's answer to Interrogatories, No.2 (CIVIL NO. 83-174-D-1)	A-35, A-36
United States District Court for the Southern District of Iowa (CIVIL NO. 78-112-D) (CIVIL NO. 78-113-D)	
Ruling and Order, filed April 25, 1980	A-37, A-38 A-39, A-40 A-41, A-42 A-43, A-44 A-45

PAGE

Order,
filed July 6, 1981 A-46, A-47
A-48, A-49
A-50, A-51
A-52, A-53
A-54, A-55
A-56, A-57
A-58, A-59
A-60, A-61
A-62, A-63
A-64, A-65
A-66, A-67

TABLE OF AUTHORITIES
CITED IN APPENDIX

PAGE

Cases:

Allen v. McCurry
U.S.
101 S.Ct. 411 (1980)--A-57

Board of Regents
v. Tomanio
U.S.
100 S.Ct. 1790,1795,
1798, 1799
(1980)---------A-52, A-60

Branchcraft v. Brewer
683 F.2d 251
(8th Cir. 1982)---A-7

Burford v. Sun Oil Co.
319 U.S. 315 (1943)---A-42

Burt v. Abel
585 F.2d 613, 616
n.7 (4th Cir. 1978)-A-64

Cahill v. Cedar
County, Iowa
367 F.Supp. 39, 45
(N.D. Iowa 1973)--A-5

Chadon v. Fernandez
454 U.S. 6, 8 (1981)--A-7

Curtis v. Loether
415 U.S. 189, 193
(1974)-------A-62

EEOC v. Liberty Loan
Corp.
584 F.2d 853, 857
(8th Cir. 1978)-A-50

George v. Parratt
602 F.2d 818
(8th Cir. 1979)--A-42

PAGE

Green v. Ten Eyck
572 F.2d 1233, 1237,
1238, 1239-------A-53, A56
A-60

Heille v. City of
St. Paul, Minn.
671 F.2d 1134, 1137
(8th Cir. 1982)--A-5

Iowa State Highway
Commission v. Read
228 N.W.2d 199, 203
(1975)
appeal after remand
262 N.W.2d 533
(1978)-------A-41

Johnson v. Railway
Express Agency,
Inc.
421 U.S. 454, 462
(1975)-------A-52, A-53

Lunday v. Vogelmann
213 N.W.2d 904, 907
(Iowa 1973)------A-55

McClain v. Meier
612 F.2d 349, 356
(8th Cir. 1979)---A-50

Monroe v. Pape
365 U.S. 167, 183
(1961)---------A-61

Parratt v. Taylor
451 U.S. 527, 536
101 S.Ct. 1908
68 L.Ed.2d 420 (1981)-A-4

Pernell v. Southall
Realty
416 U.S. 363,
375-381(1974)-----A-62, A-63

PAGE

Richards v. City of Muscatine
237 N.W.2d 48 (Iowa 1975)----A-51

Robbins v. District Court of Worth County
592 F.2d 1015, 1017 (8th Cir. 1979)----A-57

Roberts v. Browning
610 F.2d 528, 536 (8th Cir. 1978)----A-50

Rosales v. Lewis
454 F.Supp. 956, 958 (S.D. Iowa 1978)---A-53, A-54 A-56

Ross v. Bernhard
396 U.S. 531, 537, 538 (1970)--------A-63

Sigafoos v. Talbot
25 Iowa 214 (1868)----A-5

State ex rel. Iowa State Highway Commission v. Read
228 N.W.2d 199, 203 (Iowa 1975)-------A-58

Steffel v. Thompson
415 U.S. 452, 472, 473 (1974)------A-60

Stellingwerf v. Leninhan
249 Iowa 689
85 N.W.2d 912, 915 (1957)------A-41

Stovall v. City of St. Louis Board of Education
614 F.2d 528, 536 (8th Cir. 1978)---A-49, A-50

PAGE

Thornberry v. State Board of Regents
186 N.W.2d 154, 156, 157 (1971)--------A-41

Warren v. Norman Realty Co.
513 F.2d 730, 734, 735 (8th Cir.) cert. den. 423 U.S. 855 (1975)------A-56

Constitution, Statutes, Rules and Regulations:

Constitution of the United States of America:

Fifth Amendment---------A-65, A-68
Seventh Amendment-------A-62
Fourteenth Amendment----------A-65, A-68

Civil Rights Statutes of 1866----------A-64

Title 42, U.S.C.,
Section 1500(c)---------A-53, A-69
Section 1982----------A-2 , A-6
A-38, A-70
Section 1983----------A-2 , A-4
A-6 , A-7
A-38, A-45
A-49, A-52
A-57, A-64
A-70
Section 1985----------A-2 , A-7
A-38, A-71
Section 1986----------A-2 , A-72
Section 5305(a)(2)------A-73

PAGE

Federal Rules of
Appellate Procedure
Rule 40----------A-40

Rules of the United
States Court of
Appeals for the
Eighth Circuit
Rule 12(a)----------A-18

Federal Rules of
Civil Procedure
Rule 38----------A-61, A-62
Rule 56----------A-11
Rule 56(e)----------A-49, A-73

Code of Iowa (1971)
Chapter 472
Section 472.23--------A-40

Code of Iowa
(Supp. 1979-1980)
Chapter 472
Section 472.21--------A-40

Code of Iowa
Chapter 306----------A-6
Chapter 403----------A-48
Chapter 472----------A-6, A-39
A-43
Section 472.21--------A-58
Chapter 613A----------A-10, A-54
A-56
Section 613A.1(3)-----A-55
Chapter 614
Section 614.1(2)------A-54, A-55
A-56

PAGE

Miscellaneous:

46 Am. Jur. 2d
Section 417----------A-40

9 Wright and Miller,
Federal Practice
and Procedure
Section 2302 at
21-22 (1971)-------A-66

JOHN F. COLLINS, M.D., P.C.
430 West 35th Street
Davenport, Iowa 52806

Telephone 386-2455

April 29, 1985

To whom it may concern:

Mose Korey

This is to certify that Mose Korey is unable to proceed with a court action at the present time due to a recent stroke, which has affected his speech and his ability to get about. He also suffers from post irradiation treatment for a tumor.

Sincerely,

/s/
John f. Collins, M.D.
P.C.

JFC:k

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MOSE KOREY,	)	
	)	CIVIL NO.
Plaintiff,	)	83-174-D-1
	)	
vs.	)	RULING AND
	)	ORDER GRANTING
CITY OF DAVENPORT,	)	DEFENDANT'S
	)	MOTION FOR
Defendant.	)	SUMMARY
	)	JUDGMENT

The Court has before it defendant's motion for summary judgment which plaintiff has resisted. The Court finds that the motion is fully submitted and ready for ruling.

On October 21, 1983 plaintiff filed a civil rights action, pursuant to 42 U.S.C. Sections 1982, 1983, 1985 and 1986, alleging that defendant deprived him of real property, in derogation of his constitutional rights. Plaintiff's multiple alle-

gations arise from defendant's 1969 and 1980 condemnations of approximately twenty acres of plaintiff's real property, for park purposes. In 1972, plaintiff obtained a jury award in the amount of $33,020.00, plus attorney fees and costs, as the result of his state court action challenging the 1969 condemnation. In 1980, the condemnation commission awarded plaintiff $11,000 as compensation for land condemned in that year. Plaintiff brought various actions in state court from 1971 until 1982, attacking the 1969 condemnation proceeding on various grounds in each instance. On October 21, 1983, plaintiff filed a complaint in this Court requesting that the 1969 condemnation proceeding by the city be set aside and that

actual and punitive damages be awarded. On June 18, 1984 defendant filed a motion for summary judgment grounded on the statute of limitations and res judicata. Plaintiff, proceeding pro se, has vigorously resisted.

I. Plaintiff has not stated a claim upon which relief can be granted under 42 U.S.C. Section 1983.

1. Plaintiff asserts that defendant, acting under color of state law, deprived him of real property and affected his ability to engage in business as a truck farmer by reducing his acreage from twenty-seven acres to seven acres, through condemnation. See Parratt v. Taylor, 451 U.S. 527, 536, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Plaintiff's business as a truck farmer was affected indirectly by the said

condemnation, but an adverse effect indirectly resulting from valid governmental action is not protected by due process. Heille v. City of St. Paul, Minn., 671 F.2d 1134, 1137 (8th Cir. 1982). No "protected property right" has been infringed. Id.

2. Plaintiff has not been deprived of any "rights, privileges or immunities secured by the Constitution and its laws." Cahill v. Cedar County, Iowa, 367 F.Supp. 39, 45 (N.D. Iowa 1973). Iowa law, under which defendant exercised its right of eminent domain, affords a condemnee full procedural due process. In Iowa, a property owner has a constitutional right to a jury trial when his property is taken by eminent domain. Id.; Sigafoos v. Talbot, 25 Iowa 214 (1868). In Cahill,

plaintiffs attacked the state's failure to proceed under the general condemnation statute, Chapter 472, The Code, alleging that they were not afforded full due process when the state proceeded under Chapter 306, The Code. Id. Plaintiff received the benefits of Chapter 472, The Code, and exercised his right to trial by jury, recovering nearly twice the amount offered by the city. Plaintiff also recovered attorney fees and costs as required by state law. Plaintiff did not seek a jury trial or an appeal from the condemnation commission's 1980 compensation award. Plaintiff states no claim, under Section 1983 or Section 1982, for violation of due process or equal protection.

II. Claims accruing prior to October 21, 1978 are time barred.

Federal civil rights actions brought pursuant to 42 U.S.C., Sections 1983 and 1985 are subject to Iowa's five-year statute of limitations. Branchcraft v. Brewer, 683 F.2d 251 (8th Cir. 1982). The limitations period begins to run at the time of the alleged wrong. Chadon v. Fernandez, 454 U.S. 6, 8 (1981). Plaintiff's action accrued on June 9, 1969, by notice of condemnation.

III. Claims arising since October, 1978 have been adjudicated in the state court. The claims pertaining to floodings and drainage problems are not cognizable under civil rights statutes. Plaintiff's state remedies have been pursued and

exhausted. No further remedy is available in this court.

1. The 1980 condemnation involved the taking of a strip of plaintiff's land, adjacent to the 1969 land condemned, for purposes of constructing temporary and permanent drainage easements as part of the park project. Plaintiff did not challenge the compensation award received in 1980.

2. Plaintiff alleges that his privacy was invaded and that he has been harrassed and vandalized by reason of the proximity of a bikeepath, constructed by defendant on plaintiff's previously condemned property. Plaintiff's 1980 application to the state court to enjoin the city from entering and constructing the bikepath,

which was begun in 1973, was denied. Plaintiff then lost his action to quiet title in 1982. Plaintiff's appeal from the Court's adverse decision was dismissed.

3. Plaintiff's 1982 action for damages for the flooding of his crops and for an injunction to abate nuisance obstructing drainage from his own property was also dismissed by the state court in 1982. Plaintiff has been afforded, and has taken advantage of, state remedies on each cause of action that may have accrued since October 21, 1978, five years before the filing of his complaint.

Any remedy plaintiff had against the city for invasion of privacy and various allegations of discriminatory treatment appears to be time barred

under Iowa law Chapter 613A, the Code.

4. Plaintiff alleges that the city refused to allow him to farm or plant a garden, or carry away firewood from the condemned property while others were allowed to do so. The latter claim appears not to be viable in view of plaintiff's jurisdictional problems.

The Court finds that defendant's motion for summary judgment will be granted. Under the facts of this case, plaintiff has not been deprived of property in violation of his rights to due process and equal protection and has no cause of action in this court. Accordingly, there is no genuine issue of material fact and defendant is entitled to judgment as a matter of

law. Federal Rule of Civil Procedure 56.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment shall be, and hereby is, granted.

Signed this 12th day of April, 1985.

W.C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MOSE KOREY,	)	
	)	CIVIL NO.
Plaintiff,	)	83-174-D-1
	)	
vs.	)	ORDER DENYING
	)	MOTION TO
CITY OF DAVENPORT,	)	RECONSIDER
	)	
Defendant.	)	
	)	

The Court has before it plaintiff's letter dated May 2, 1985. Plaintiff expresses his feeling that the Court's Order granting summary judgment to defendant was unfair because the Order was entered after plaintiff had requested a stay of all proceedings due to health problems. Plaintiff's letter will be treated as a motion to reconsider the entry of judgment in favor of defendant.

Defendant's motion for summary judgment was filed on June 18, 1984.

Plaintiff was granted an extension of time until July 13, 1984, to respond to the motion. A further extension was granted until July 27, 1984. Plaintiff filed his resistance to the motion for summary judgment on July 27, 1984. The resistance was accompanied by a six-page memorandum in support thereof, a separate fourteen-page memorandum of points and authorities, a twenty-page affidavit of material facts, and twenty-nine exhibits. Defendant's subsequent request for oral argument was also resisted by plaintiff.

On November 30, 1984, plaintiff filed an application for a stay of six months due to health problems. This motion was not ruled on by the Court.

On April 12, 1985, having reviewed defendant's motion and plaintiff's re-

sistance both to the motion and to defendant's request for oral argument, the Court deemed the matter fully submitted and proceeded to rule on the motion for summary judgment. The Court's ruling will stand, and plaintiff's motion to reconsider will be denied. Plaintiff fully resisted defendant's motion and expressed his belief that oral argument was not necessary. A period of four months then passed before plaintiff requested a stay. At any time during that period, the Court could have considered the motion for summary judgment fully submitted and proceeded to rule thereon. If plaintiff desired to make further arguments, he had ample opportunity to do so before November 30. Plaintiff does not now state what additional arguments he

would have made, and the Court can conceive of none. Summary judgment in defendant's favor was clearly appropriate.

IT IS THEREFORE ORDERED that plaintiff's motion to reconsider is hereby denied.

Signed this 8 day of May, 1985.

W.C. STUART, JUDGE
SOUTHERN DISTRICT OF IOWA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

August 15, 1985

Mr. Mose Korey
3026 Belle Avenue
Davenport, IA 52803

Re: No. 85-1669-SI
Mose Korey vs. City of
Davenport, Iowa

Dear Mr. Korey:

Enclosed is a copy of an order entered by us today at the direction of the court.

Sincerely,

/s/
Michael E. Gans
Chief Deputy

MEG/cgj

Enclosure

cc: Patricia Rhodes Cepican
James R. Rosenbaum, Clerk,
U.S. District Court

FOR INFO ONLY:
Honorable William C. Stuart
(83-1274 D 1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1669

MOSE KOREY,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court
v.	*	for the Southern
	*	District of Iowa.
CITY OF DAVENPORT, IOWA,	*	
	*	
Appellee.	*	
	*	

Submitted: August 1, 1985

Filed: August 15, 1985

ORDER

Mose Korey appeals from an order of the district court granting summary judgment in favor of the City of Davenport, Iowa. After reviewing the record, we find that the district court committed no error

of law or fact. Accordingly, we conclude that the issues presented do not require further consideration. We affirm the district court. See 8th Cir. R. 12(a).

A true copy.

Attest:

CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

Mr. Mose Korey
3026 Belle Avenue
Davenport, Iowa 52803

Re: No. 85-1669-SI
Mose Korey v. City of
Davenport, Iowa.

Dear Sir:

Enclosed please find copy of order entered today at the direction of the Court.

Sincerely,

/s/
Linda L. Penberthy
Senior Deputy Clerk

rmh

Enclosure (1)

cc: Patricia Rhodes Cepican
James R. Rosenbaum, Clerk,
U.S. District Court
(83-174-D-1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1669-SI

MOSE KOREY,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
vs.	*	District Court
	*	for the Southern
CITY OF	*	District of Iowa
DAVENPORT, IOWA,	*	
	*	
Appellee.	*	
	*	

Appellant's petition for rehearing is denied by the Court on the basis of untimely filing.

September 19, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

October 3, 1985

Mr. James R. Rosenbaum, Clerk
U. S. District Court
200 U. S. Cthse.
Des Moines, IA 50309-2084

Re: No. 85-1669-SI
Mose Korey vs. City of
Davenport, IA
(83-174-D-1)

Dear Sir:

The mandate of this Court is enclosed together with a receipt therefore in the above case. We would appreciate it if you would sign, date and return the receipt to this office.

Returned are two volumes of original files.

Sincerely,

eh
Encl 3

ROBERT ST. VRAIN, CLERK
By E. Hoffman
Deputy Clerk

cc: Mose Korey
Patricia Rhodes Cepican

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

October 11, 1985

Mr. Mose Korey
3026 Belle Avenue
Davenport, Iowa 52803

Re: No. 85-1669-SI
Mose Korey v. City of
Davenport, Iowa.

Dear Mr. Korey:

Receipt is acknowledged of your motion to correct error. Petitions for rehearing must be filed within fourteen days of entry of judgment per FRAP 40. The three-day mailing privilege is not extended to petitions for rehearing, at least by this Circuit, and petitions that are untimely by even one day may be rejected by the Court. I wish to assure you, however, that the Court did view the content of your document and considered your comments.

The fact that your petition has been denied does not preclude you from proceeding with the case to the Supreme Court of the United States. You are

however urged to insure that your petition is timely filed with that Court.

Sincerely,

/s/
Linda L. Penberthy
Senior Deputy Clerk

LLP/rmh

Enclosure (1)

cc: Patricia Rhodes Cepican
James R. Rosenbaum, Clerk,
U. S. District Court.
(83-1274-D-1)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U. S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

November 6, 1985

Mr. Mose Korey
3026 Belle Avenue
Davenport, Iowa 52803

Re: No. 85-1669SI
Mose Korey v. City of
Davenport, Iowa

Dear Mr. Korey:

The opinions and dispositive orders of this Court which are issued by the Clerk's office are all entered at the direction of a panel of judges after consideration of the record and any briefs or other pleadings which have been submitted by the parties. In your case, the entire original file of the United States District Court was obtained from the district court. The district court file and the pro se brief which you filed were sent to a panel of judges which considered your appeal. The panel consisted of Judges Donald Ross, Theodore McMillian and George Fagg. The Order of August 15, 1985 affirming the district court's action and the order of September 19, 1985 denying your petition for

rehearing were entered only after this office received directions from the three judges to issue those orders.

Because the Eighth Circuit Court of Appeals includes seven states and the judges are located throughout the seven states opinions and orders must be issued from a central source-the Clerk's office in St. Louis. Opinions and orders must be duplicated for distribution to the parties, the district court and the media. It is impractical to have these documents individually signed by each judge on the panel. The August 15 Order disposing of your appeal should have identified the members of the panel which considered your appeal. I apologize for that administrative oversight. Your case was properly handled by this office. The case was considered by and ruled on by a three judge panel and the appeal was officially concluded with the issuance of this Court's mandate on October 3, 1985.

Sincerely,

/s/
Robert St. Vrain
Clerk of Court

RStV/cg

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

MOSE KOREY, Plaintiff,	IN EQUITY
VS.	NO. 51298
CITY OF DAVENPORT, IOWA Defendant.	NOTICE TO DEFENDANT OF ORDER TO SHOW CAUSE

TO: CITY OF DAVENPORT, IOWA
a municipal corporation

You are hereby notified that there is now on file in the office of the Clerk of the District Court of Scott County, Iowa, the petition and affidavit of the plaintiff in this action, alleging that "a landowner shall not be dispossessed, under condemnations proceedings, of his residence, dwelling house, outhouse, orchard or gardens, until the damages thereto have been finally determined

and paid", that plaintiff has not consented to the establishment of said park on his orchard or gardens and does not and will not consent thereto, and praying that a temporary injunction restraining the defendant from establishing a park thereon.

You are further notified that on the 9th day of June, A.D., 1969, upon reading the said petition and affidavit of the plaintiff and hearing the evidence in support thereof, the Honorable Nathan Grant, Judge of said Court, entered an Order and Decree that the defendant show cause before him as such Judge of said Court, at 2:30 o'clock P.M., on the 26th day of June, A.D., 1969, at the Court House in Davenport, Iowa, why an injunction should not be issued enjoining and

restraining you as the defendant in the case from condemning the real estate of the plaintiff and for such other and further relief with reference to said cause as may be just and equitable in the premises, and that in the meantime that you as the defendant be restrained and forbidden to commit or permit any of said acts until further Order of this Court.

You will therefore take due notice of such restraining Order to avoid the penalties of the law.

You will also take due notice that unless you appear and show cause at the above stated time and place, that your default will be entered and judgment and decree rendered as provided by law granting such relief, as prayed in said petition, as may be necessary in the

premises, and that a temporary injunction will issue as prayed to be in full force and effect until final hearing in this action.

Dated at Davenport, Scott County, Iowa, this 9th day of June, A.D., 1969.

Don A. Petruccelli
Attorney for Plaintiff
716 First National
Building
Davenport, Iowa 52801
Phone: 323-0874

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

MOSE KOREY, Plaintiff, VS. CITY OF DAVENPORT, IOWA, Defendant.	ORDER FOR HEARING ON TEMPORARY INJUNCTION NO. 51298 IN EQUITY

Now, on this 9th day of June, A.D., 1969, it satisfactorily appearing from the petition of the plaintiff and the affidavit and evidence in support thereof, that sufficient grounds exist for the issuance of a temporary injunction as prayed:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant show cause before the undersigned Judge of this Court, at 2:30 o'clock A.M. on the 26th day of June, A.D., 1969, at the Court

House in Davenport, Iowa, why an injunction should not be issued enjoining and restraining the defendant from condemning the real estate as shown in Exhibit "A" attached to the petition and for such other and further relief with reference to the said cause as may be just and equitable in the premises.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the meantime, the defendant is hereby restrained and forbidden to commit or permit any or said acts until the further Order of this Court.

NATHAN GRANT, JUDGE
Seventh Judicial
District of Iowa

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

MOSE KOREY,	)	
	)	ORDER FOR TEMPORARY
Plaintiff,	)	INJUNCTION
	)	
VS.	)	NO. 51298
	)	
CITY OF DAVENPORT, IOWA,	)	IN EQUITY
	)	
Defendant.	)	
	)	

Now, on this 9th day of June, A.D., 1969, it satisfactorily appearing from the petition of the plaintiff and the affidavit and evidence in support thereof, that sufficient grounds exist for the issuance of a temporary injunction as prayed:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant show cause before the undersigned Judge of this Court, at 2:30 o'clock P.M. on the 26th day of June, A.D., 1969, at the Court

House in Davenport, Iowa, why an injunction should not be issued enjoining and restraining the defendant from condemning the real estate as shown in Exhibit "A" attached to the petition and for such other and further relief with reference to the said cause as may be just and equitable in the premises.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the meantime, the defendant is hereby restrained and forbidden to commit or permit any or said acts until the further Order of this Court.

NATHAN GRANT, JUDGE
Seventh Judicial
District of Iowa

STATE OF IOWA)
):SS
SCOTT COUNTY)

I, William A. Strout, Sheriff of Scott County, Iowa do hereby certify that I received the attached Order for Temporary Injunction on June 9, 1969, and on said date I served personally City of Davenport, Iowa by serving Allyn Wiese, Clerk for the City, by giving and reading to him a true copy thereof. Said service being made in the City of Davenport, Scott County, Iowa.

William A. Strout, Sheriff
Scott County, Iowa

By Jim Alexander
Deputy Sheriff

Defendant's Answers to
Interrogatories, No. 2

1. State whether or not Defendant obtained prior written approval from the Secretary of Housing and Urban Development for conversion of open-space land to any other uses, such as water mains and sewer lines, as required by Title 42, United States Code, Section 1500c, and if so, state the date of such approval and a description of all documentation known to Defendant in connection with the application for such prior written approval and the written approval itself.

ANSWER: It is not believed that any prior written approval was obtained. By way of further answer, defendant states that the uses are consistent with the purposes of the Open Space Program and it is not altogether clear that prior written approval for such uses was or is required.

2. State whether or not Defendant was served a copy of Order for Temporary Injunction and Order for Hearing on Temporary Injunction, dated June 9, 1969, signed by Judge Nathan Grant, and state the date on which service was made upon Defendant and whether or not Defendant has a copy of said orders in its possession.

ANSWER: Defendant has no independent recollection that it was served or when it was served. Defendant does have a copy of the order issued June 9, 1969. The sheriff's return of service shown service on Allyn Wiese, City Clerk, on June 9, 1969. Defendant further states that no temporary injunction was ordered, issued, or served on June 9, 1969, or at any other time.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ROBERT E. SHOEMAKER, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	CIVIL NO. 78-112-D
ROBERT PAPE, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	RULING AND ORDER CIVIL NO. 78-113-D

On December 27, 1979, the Court entered an Order reviewing several motions in the above-captioned cases initiated by property owners in Muscatine, Iowa against the City of Muscatine challenging the legality and constitutionality of the defendant's

condemnation of certain described property. The Court in that Order granted the plaintiffs' unresisted joint motion for consolidation, and the defendant's motion for summary judgment as to plaintiffs Shoemakers' and Papes' claims initiated under 42 U.S.C. Sections 1982 and 1985. In addition, the Court denied the defendant's motion as to the plaintiffs' claims initiated under 42 U.S.C. Section 1983, and ordered the plaintiffs to respond to the res judicata and abstention issues raised by the defendant. On January 28, 1980, the plaintiffs filed their responses and affidavits. The defendant on January 30, 1980 filed a brief in support of its summary judgment motion, and filed a supporting affidavit on February 22, 1980. The

plaintiffs filed a reply to this affidavit on March 3, 1980. The issues in question are now fully submitted.

As to the defendant's res judicata claims, the Court does not believe the plaintiffs' actions presently before the Court are barred because of the plaintiffs' initiation and litigation of claims in Iowa District Court pursuant to Chapter 472 of the Iowa Code. It is true that a party cannot avoid the effects of res judicata by failing to assert matters in the former litigation that were properly subject to litigation there. The rule is stated as follows:

> The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination

> of the questions involved in the prior action; the conclusiveness of the judgment in such a case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein.

46 Am. Jur. 2d Section 417.

The Court does not believe, however, that the issues raised in the above-captioned action could have been raised at the time their respective appeals were taken to the district court. When their appeals of their condemnation awards were initiated pursuant to Iowa Code Annotated Section 472.21 (Supp. 1979-80), the sole issue available for determination by the district court appeared to be the amount of damages owed by the condemnor. Iowa Code Annotated Section 472.23 (1971);

State ex rel. Iowa State Highway Commission v. Read, 228 N.W. 2d 199, 2[illegible] 975), appeal after remand 262 N.W. 2d 533 (1978); Stellingwerf v. Leninhan, 249 Iowa 689, 85 N.W. 2d 912, 915 (1957). See also Thornberry v. State Board of Regents, 186 N.W. 2d 154, 156-57 (1971). The constitutional claims asserted in this action could not have been raised by plaintiffs. The cases cited by defendant in support of its contention that res judicata bars the plaintiffs' federal actions are inapplicable here because in those cases the plaintiff either had or could have previously litigated a question or claim before coming into federal court. Therefore, the defendant's motion for summary judgment is denied.

The Court has remaining before it

for consideration the defendant's claim that the Court should invoke the doctrine of abstention. After careful consideration, the Court believes that it should not abstain from consideration of the plaintiffs' claims. See George v. Parratt, 602 F. 2d 818 (8th Cir. 1979).

As to the Papes' claims, there is no ongoing state action involving their claims which could eliminate or alter the constitutional issues before this Court. The Papes would have no state remedies available at this time to assert their claims if their federal action is dismissed. In addition, the Court does not believe that federal court disposition of Papes' claims would interfere with a comprehensive state policy. Burford v. Sun Oil Co., 319 U.S. 315 (1943). The legislature

of the State of Iowa has established the procedure in Chapter 472 to be followed by condemnees in challenging the amount of condemnation awards, but no such procedure has been created for challenges to the legality and constitutionality of the condemnor's actions. Therefore, disposition of Papes' claim shall proceed without interruption.

In addition, even though Shoemakers presently have an appeal pending before the Iowa Supreme Court of the Iowa district court's dismissal of Division IV of their state law complaint, the Court feels application of the doctrine of abstention would be inappropriate. The Court has already determined that consideration of the Papes' claims must proceed. Since the cases initiated by the Papes

and Shoemakers have been consolidated and raise substantially the same issues, it would not further the interests of judicial efficiency to split consideration of the cases between the federal and state judicial systems. Further, as was the case with the Papes' claims discussed above, the Court does not believe that federal court consideration of the Shoemakers' claims would interfere with a comprehensive state policy. Therefore, the Court does not believe it is justified in staying any further action on Shoemakers' claims.

This ruling will not preclude defendants from reasserting their motion for abstention, if the Iowa Supreme Court remands the issues in Division IV of Shoemaker to the

District Court of Iowa for trial upon the merits. Dismissal of the appeal could create additional res judicata issues not presently before the Court.

IT IS THEREFORE ORDERED that the defendant's Motion for Summary Judgment as to the plaintiffs' claims under 42 U.S.C. Section 1983 is hereby denied.

IT IS FURTHER ORDERED that the Court shall not stay further action on the plaintiffs claims initiated pursuant to 42 U.S.C. Section 1983.

Signed this 25 day of April, 1980.

W.C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

ROBERT E. SHOEMAKER, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	CIVIL NO. 78-112-D
ROBERT PAPE, et al., Plaintiffs, vs. CITY OF MUSCATINE, IOWA, Defendant.	CIVIL NO. 78-113-D

ORDER

This matter is before the Court pursuant to motions to strike jury demand and for summary judgment, filed by defendant on March 26, 1981 and resisted by the Shoemakers on April 1, 1981. The Papes' filed their resistance to both motions on May 26, 1981.

On May 26, 1981, defendant's motions came on for hearing before the Court. All plaintiffs by agreement were represented by Bruce Washburn and defendant by Patrick Ryan. Having carefully considered the file in the above-captioned case together with the arguments of counsel, and being otherwise fully advised in the premises, the Court enters the following Order.

This is a civil rights action initiated by Muscatine, Iowa property owners to contest the legality and constitutionality of the appropriation of certain described property pursuant to an urban renewal project. Specifically, plaintiffs allege that their property was wrongfully taken in the context of condemnation proceedings instituted under an urban renewal plan

premised on false and nonexistent factual findings purportedly derived in an arbitrary and capricious manner by the defendant's City Council. Chapter 403 of the Iowa Code requires the City to make particular findings of fact as part of the condemnation procedure prescribed by state urban renewal law. It is plaintiffs' contention that the acts of the City Council were perpetrated knowingly, willfully and in excess of its authority, with the intent to effect the confiscation of plaintiffs' property without due process of law in order to permit the utilization of such property by a private corporation for development.

I. Motion for Summary Judgment

Defendant moves for summary judgment on the grounds that plaintiffs'

claims under section 1983 are barred by the applicable state statute of limitations and through the operation of the doctrine of res judicata.

Federal Rule of Civil Procedure 56 in general provides that where the record discloses no genuine issue of material fact and where one of the parties is entitled to judgment as a matter of law, that party may move for and, if appropriate, obtain summary judgment. Once the movant supports his motion with matters outside the pleadings, the party opposing such motion cannot rest on the allegations of his complaint, but is required to come forward with evidentiary facts in resistance. Federal Rule of Civil Procedure 56(e). See Stovall v. City of St. Louis Board of Education,

614 F. 2d 619, 621 (8th Cir. 1980); Roberts v. Browning, 610 F. 2d 528, 536 (8th Cir. 1978). The Court must assess the facts in the light most favorable to the nonmovant, and the latter must be afforded the benefit of all favorable inferences which may be derived from the underlying facts as revealed in the pleadings, depositions and affidavits filed therein. McClain v. Meier, 612 F. 2d 349, 356 (8th Cir. 1979); EEOC v. Liberty Loan Corp., 584 F. 2d 853, 857 (8th Cir. 1978).

A. Statute of Limitations

Resolution 74067, which contains the findings of fact upon which this lawsuit is premised, was passed by the Muscatine City Council on July 18, 1974. Although the initial appraisal of plaintiffs' property had been under-

taken pursuant to the urban renewal plan outlined in the resolution, the implementation thereof was suspended until November 12, 1975, at which time the Iowa Supreme Court issued a ruling upholding the City's incremental financing arrangement in the test case of Richards v. City of Muscatine, 237 N.W. 2d 48 (Iowa 1975). In light of the state court decision, the City Council voted on December 18, 1975 to proceed with the urban renewal project. It was not until December 22, 1976, however, that the actual taking of plaintiffs' property was effectuated. The Shoemakers and Papes filed their complaints in this Court on the 9th and 11th days of December, 1978, respectively.

In the Court's estimation, the

deprivation of plaintiffs' property occurred at the point of the actual taking, on December 22, 1976. Prior to that date, plaintiffs could not have sought to maintain an action for damages under section 1983, since no legally cognizable injury to plaintiffs' constitutional rights had yet been inflicted. The statutory period within which the condemnation could be attacked did not commence until December 22, 1976.

Because section 1983 does not contain express time limits within which suits arising thereunder are to be filed, the Court must review the timeliness of plaintiffs' cause by applying the most analogous Iowa statute of limitations. Board of Regents v. Tomanio, ___U.S.___, 100 S.Ct. 1790, 1795-1795 (1980); Johnson v. Railway

Express Agency, Inc., 421 U.S. 454, 462 (1975); Green v. Ten Eyck, 572 F. 2d 1233, 1237 (8th Cir. 1978). In order to do so, the Court must ascertain the underlying cause of action under state law and enforce the limitation which the state would enforce if the action had been brought in its court system. Rosales v. Lewis, 454 F. Supp. 956, 958 (S.D. Iowa 1978). This rule presents little difficulty where state law provides for a limitations period directly analogous to the federal claim; however,

> where a more attenuated analogy is required, the Court (1) may look to the nature of the defendant's conduct and apply the statute of limitations applicable to tort actions premised on similar conduct, or (2) may apply the state's limitation relating to statutorily-created liabilities. (Citations omitted).

Rosales v. Lewis, 454 F. Supp. at 958.

Defendant argues that the Iowa Tort Claims Act Chapter 613A, furnishes a closer analogy to plaintiffs' federal cause of action than the general two-year limitation period delineated in Section 614.1(2) of the Code. Bearing in mind, however, the generous nature of the relief afforded under section 1983 as well as the marked trend evident in recent Supreme Court decisions toward expansion of municipal liability in civil rights actions, the Court is persuaded that a severe circumscription of the federal remedy which would result if the brief limitation prayed for were imposed cannot be sanctioned. Accordingly, the Court finds that the most analogous Iowa Statute of Limitations is the two-

year limit on suits predicated upon injuries to persons or reputation delineated in section 614.1(2).

One of the primary purposes of section 613A.1(3) abbreviated notice and limitations components is to alert the municipality of the commission of the alleged tort, in order to permit prompt investigation. See Lunday v. Vogelmann, 213 N.W. 2d 904, 907 (Iowa 1973). Since defendant acknowledges and the facts plainly demonstrate that the City Council had ample forewarning of plaintiffs' vigorous objections to its urban renewal project and the concommitant expropriation of their property, the legislative intent underlying Section 613A.5 is not frustrated by this Court's choice of the general two-year statute of limitations. See

Rosales v. Lewis, 454 F. Supp. at 960. Moreover, where the language of Chapter 613A does not evince an overiding state interest in regulating the precise form of tortious conduct comprising the subject matter of this lawsuit, the argument for application of its limitations provision becomes less compelling. See Green v. Ten Eyck, 572 F. 2d at 1237-1238; Warren v. Norman Realty Co., 513 F. 2d 730, 734-735 (8th Cir.) cert. den., 423 U.S. 855 (1975).

Having determined that the date of the alleged wrong was December 22, 1976, and because plaintiffs filed their respective complaints within the applicable two-year time frame provided in section 614.1(2), both the Papes and Shoemakers are entitled to litigate their constitutional claims in this Court.

B. Res Judicata

With regard to defendant's argument that the Shoemaker's continued maintenance of this action is precluded by the doctrine of res judicata, the Court after a perusal of the authorities cited for this proposition finds that defendant's motion for summary judgment on this ground should be denied. Admittedly, principles of res judicata operate in section 1983 lawsuits to bar relitigation of constitutional issues actually or necessarily adjudicated in a previous lawsuit involving the same cause of action. See Allen v. McCurry, ___ U.S. ___, 101 S.Ct. 411 (1980); Robbins v. District Court of Worth County, 592 F. 2d 1015, 1017 (8th Cir. 1979).

However, the constitutional questions raised in Division IV of the Shoemaker's state law complaint were not properly before the state district court, and thus could not have been actually or necessarily disposed of in that court. Under the rationale set forth in the Order of April 25, 1980, the state court's subject matter jurisdiction was restricted pursuant to Section 472.21 of the Code to a determination of the propriety of the amount of damages assessed by the condemnation commission. State ex rel. Iowa State Highway Commission v. Read, 228 N.W. 2d 199, 203 (Iowa 1975), appeal after remand, 262 N.W. 2d 533 (197 Iowa 1978). Therefore, since the claims pending before this Court could under no circumstances have been entertained by the

state district court, the principle of res judicata does not foreclose plaintiffs' right to pursue such claims herein.

Defendant insists that its motion must be sustained as a result of plaintiffs' failure to challenge the legality of the condemning public body's actions in a separate proceeding in equity, whereby the plaintiff condemnees could have requested an injunction prohibiting the condemnor from confiscating their property. In effect, defendant is not seeking judicial application of res judicata precepts to prevent readjudication of matters which were actually or which could have been asserted on appeal of a condemnation award, but to foreclose further review of plaintiffs putative

constitutional claims because the latter did not resort to a collateral state remedy.

The foregoing argument as framed by defendant may well have prevailed on appeal to the Iowa Supreme Court of the state district court's dismissal of Division IV of the Shoemaker state complaint. Upon careful evaluation of the case, however, the Court is not persuaded that the mere existence of an available collateral remedy compels its disregard of the well-established axiom that exhaustion of state judicial or administrative avenues of relief is not a prerequisite to suit under section 1983. See Board of Regents, 100 S.Ct. at 1798-1799; Steffel v. Thompson, 415 U.S. 452, 472-473 (1974); Green v. Ten Eyck, 572 F. 2d at 1239. For as

the Supreme Court has observed:

> [I]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Monroe v. Pape, 365 U.S. 167, 183 (1961). Accordingly, the defendant's motion for summary judgment on res judicata grounds is hereby denied.

II. Motion to Strike

As to defendant's motion to strike plaintiffs' jury demand, no allegation is raised therein as to plaintiffs' noncompliance with the procedural requirements delineated in Rule 38 of the Federal Rules of Civil Procedure. Instead, defendant argues that the issues involved in this lawsuit, while legal in nature, are not triable to a jury. By way of response, plaintiffs

contend that the factual issues underlying their claims are appropriate for consideration by a jury.

Rule 38 preserves intact the Seventh Amendment right of trial by jury. Although the amendment was designed to incorporate the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time. Curtis v. Loether, 415 U.S. 189, 193 (1974). Where a legislature creates an action unheard of at common law, the Seventh Amendment mandates a trial by jury if that action implicates rights and remedies traditionally enforced in an action at law. Pernell v. Southall Realty, 416 U.S. 363 (1974).

In Curtis, a statutory action

establishing a right to recover damages was deemed to have been instituted to vindicate legal rights. Of importance in ascertaining the character of a statutory action is the nearest historic analogue. See Pernell v. Southall Realty, 416 U.S. at 375-381. Ultimately, whether or not a party is entitled to a jury trial is contingent upon the legal aspects of the issues to be tried, as opposed to the character of the overall lawsuit. Ross v. Bernhard, 396 U.S. 531, 537-538 (1970).

According to defendant, the nature of the primary issue to be adjudicated herein, the validity of the City Council's decision to condemn plaintiffs' property for an ostensibly public use, militates against a grant of plaintiffs' jury demand. Albeit its

admission that plaintiffs' suit is essentially legal in nature, defendant maintains that the Council's inherently legislative determination is reviewable by the Court alone, under a deferential "arbitrary and capricious" standard.

There is no question that the compensatory relief requested under Section 1983 is analogous to that typically sought in a tort action for damages. Moreover, defendant concedes that complainants, whose cause of action is subsumed under the civil rights statutes of 1866, enjoy a general right to trial by jury of their constitutionally cognizable grievances. See Burt v. Abel, 585 F. 2d 613, 616 n.7 (4th Cir. 1978).

Thus the question becomes whether the presence of several matters to be

adjudicated by the court as a matter of law nullifies plaintiffs' jury demand. Non-legislative issues of fact which may properly be disposed of by the jury include the actual truth or falsity of factual findings upon which the city council's conclusions were based, whether such findings were made with the intent to deprive plaintiffs of their property without due process of law and whether the challenged urban renewal plan, MURP II, conformed to the comprehensive plan adopted by the City of Muscatine, as mandated by state law. The specific determinations of whether (1) the characterization of plaintiffs' property as "blighted" was arbitrary and capricious and in excess of the Council's authority under the Fifth and Fourteenth Amendments, and

(2) the confiscation of such property was effected for a private rather than a public benefit are ultimately for the Court, as are all constitutional issues. However, the Court believes that the factual questions upon which such legal determinations must rest may be joined before a jury.

In the final analysis, therefore, the Court is persuaded that defendant's motion to strike plaintiffs' jury demand must be denied. Over the years, the Supreme Court has developed a strong policy favoring jury trials, which in doubtful cases such as the one at bar warrants judicial adherence thereto. See 9 Wright and Miller, Federal Practice and Procedure, Section 2302 at 21-22 (1971) and cases cited therein. In this light, the Court must

recognize the existence of disputed factual questions which while forming a predicate for pure issues of law, may nonetheless be submitted to a jury, thereby attesting to the general propriety of plaintiffs' jury demand. Those matters of law which cannot be considered by the jury will of course be adjudged by the Court.

IT IS THEREFORE ORDERED that defendant's Motions to Strike Jury Demand and for Summary Judgment are hereby denied.

Signed this 6th day of July, 1981.

W.C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> SECTION I. All persons born, or naturalized in the United States, and subject to

the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, wthout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code,

Section 1500(c) provides:

> No open-space land for the acquisition of which a grant has been made under this chapter of this title shall be converted to uses not originally approved by the Secretary without his prior approval. Prior approval will be granted only upon satisfactory compliance with regulations established by the Secretary. Such regulations shall require findings that (1) there is adequate assurance of the substitution of other open-space land of as nearly as feasible equivalent usefulness, location, and fair market value at the time of the conversion; (2) the conversion and substitution are needed for orderly

growth and development; and (3) the proposed uses of the converted and substituted land are in accord with the then applicable comprehensive plan for the urban area, meeting criteria established by the Secretary.

Title 42, United States Code,

Section 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Title 42, United States Code,

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42, United States Code, Section 1985 provides in pertinent part:

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;.....in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby

another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code, Section 1986 provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power toprevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damage may be recovered in an action on the case;.....But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Title 42, United States Code, Section 5305(a)(2), which was in effect at the time of the actions complained of, said in pertinent part:

> ....In addition, an applicant may use block grant funds to acquire or construct parks, only if assistance for such parks under other federal laws or programs is determined to be unavailable.

Rule 56(e), Federal Rules of Civil Procedure, Notes of Advisory Committee on Rules, 1963 Amendment, provides in pertinent part:

> .....Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

The above APPENDIX TO PETITION FOR WRIT OF CERTIORARI respectfully submitted on this 4th day of December, 1985.

Mose Korey

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

CERTIFICATE OF SERVICE

This is to certify that the undersigned did on this 5th day of December, 1985, deposit in the U.S. Mail, postage prepaid for delivery by first class mail to the following addresses:

1. Mr. Alexander L. Stevas,
Clerk
United States Supreme
Court Building
1 First Street, N.E.
Washington, D.C. 20543

forty-three (43) copies of:

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

for filing, of which three (3) copies are to be returned to Petitioner after filing.

2. Patricia Rhodes Cepican
3432 Jersey Ridge Road
Davenport, Iowa 52803

three (3) copies of same document.

I further certify that, in compliance with Supreme Court Rule 28.5(c), all parties required to be served have been served.

Mose Korey
MOSE KOREY

Subscribed and sworn to before me on this 4th day of December, 1985.

Dawn L Helfrich
NOTARY PUBLIC

(3)

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOSE KOREY,
Petitioner,

vs.

CITY OF DAVENPORT, IOWA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

PATRICIA RHODES CEPICAN
MCDONALD, STONEBRAKER & CEPICAN, P.C.
3432 Jersey Ridge Road
Davenport, Iowa 52807
(319) 355-6478

Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

18 pp

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statutes Involved in the Case	v
Statement of the Case	1
Argument	4
I. The Procedural Issues Presented Do Not Require Resolution By This Court	4
II. There Is No Conflict Between The Rulings Below And The Decisions Of Other Circuits Or The Supreme Court Warranting The Granting Of The Petition For Writ of Certiorari	4
III. As The Summary Judgment Motion Was Correctly Decided, Review By This Court Is Unnecessary	6
A. Statute of limitations	7
B. Claim and issue preclusion	9
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed. 2d 308 (1980) 9

B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc., 242 N.W.2d 279 (Iowa 1976) 9

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), appeal pending 8

Benavidez v. Gunnell, 722 F.2d 615 (10th Cir. 1983) 5

Bd. of Sup'rs., Carroll County v. Chi. & NW Transp. Co., 260 N.W.2d 813 (Iowa 1977) 9

Bourjaily v. Johnson County, 167 N.W.2d 630 (Iowa 1969) 10

Branchcomb v. Brewer, 683 F.2d 251 (8th Cir. 1982) ... 7

Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945) 4

Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) (per curiam) 7

Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) 4

Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) 7

Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982), cert. denied, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982) 7

Gorin v. Osborne, 756 F.2d 834 (11th Cir. 1985) 5

Gruener v. City of Cedar Falls, 189 N.W.2d 577 (Iowa 1971) 8

Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), rehearing denied, 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 819 (1972) 6

Halweg v. City of Sioux City, 189 N.W.2d 623 (Iowa 1971) 10

Heinz v. City of Davenport, 230 Iowa 7, 296 N.W. 783 (1941) 10

Klinge v. Lutheran Charities Ass'n. of St. Louis, 523 F.2d 56 (8th Cir. 1975) 6

Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) 9

Migra v. Warren City School District Board of Education, ____ U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) 9

Robbins v. District Court of Worth County, Iowa, 592 F.2d 1015 (8th Cir. 1979) 9

Russell v. Harrison, 736 F.2d 283 (5th Cir. 1984)..... 5

Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982) .. 5

Tatum v. Golden, 570 F.2d 753 (8th Cir. 1978), cert. denied, 436 U.S. 960, 98 S.Ct. 3079, 57 L.Ed.2d 1127 (1978) 7

Wilson v. Garcia, 471 U.S. ____, 107 S.Ct. ____, 85 L.Ed. 2d 254 (1985)..... 7

Statutes:

42 U.S.C. Section 1982 ..... 3, 8

42 U.S.C. Section 1983 3

42 U.S.C. Section 1985 3

42 U.S.C. Section 1986 ..... 3, 7

Code of Iowa, Section 613A.5 ..... v, 8

Code of Iowa, Section 614.1(2) ..... v, 8

Code of Iowa, Section 614.1(4) ..... vi, 7

Federal Rules of Appellate Procedure:

Rule 25(a), FRAP 4

Rule 26(a), FRAP 4

Rule 36, FRAP 4

Rule 40(a), FRAP 4

Rule 41(a), FRAP 4

STATUTES INVOLVED IN THE CASE

Code of Iowa, Section 613A.5 provides as follows:

> Every person who claims damages from any municipality or any officer, employee, or agent of a municipality for or on account of any wrongful death, loss or injury within the scope of Section 613A.2 or Section 613A.8 or under common law shall commence an action therefor within six months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. Failure to state time or place or circumstances or the amount of compensation or other relief demanded shall not invalidate the notice; providing, the claimant shall furnish full information within fifteen days after demand by the municipality. No action therefor shall be maintained unless such notice has been given and unless the action is commenced within two years after such notice. The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by his injury from giving such notice.

Code of Iowa, Section 614.1 provides as follows:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> * * *
>
> **2. Injuries to person or reputation — relative rights — statutory penalty.**
>
> Those founded on injuries to the person or reputation, including injuries to relative rights, whether bas-

ed on contract or tort, or for a statute penalty, within two years.

* * *

4. Unwritten contracts — injuries to property — fraud — other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within 5 years, except as provided by subsections 8 and 10.

No. 85-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOSE KOREY,
Petitioner,

vs.

CITY OF DAVENPORT, IOWA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Mose Korey, has for many years, been engaged in farming near Duck Creek in the City of Davenport. The City has developed around him. Prior to 1969 Davenport obtained federal grant money for acquisition of land in the Duck Creek flood plain for park purposes, specifically the construction of a cross-town off-street bicycle path. The City began acquiring land in the flood plain and in 1969 condemned approximately 20 acres of Mr. Korey's land. In the early to mid 1970's, Petitioner consulted with legal counsel regarding remedies available for claimed violations of his rights in connection with that condem-

nation. His attorneys were allegedly denied opportunities to speak at City Council meetings or to the Mayor in 1972. In 1975 Petitioner was allegedly denied permission to plant on the land condemned from him. He was allegedly prohibited from taking firewood from the land in 1981. By 1980, the bicycle path construction project was reaching the land condemned from Petitioner. That same year, other land was condemned for drainage easements and the construction of ditches and storm sewers was commenced. Mr. Korey protested this condemnation but acquiesced in the monies awarded by the condemnation commission.

This action is one in a series of litigated disputes between the parties. In June 1969 Petitioner sued in state court to enjoin the condemnation. An order was issued setting a hearing for a temporary injunction and directing the City to take no further action pending the hearing. The hearing did not take place and there were no further proceedings in that case, although Mr. Korey now claims the condemnation proceedings were void because the City violated the order. In July 1969 Petitioner appealed the award of the condemnation commission. At the second trial of that cause, the damages awarded were nearly double the amount set by the condemnation commission. He appealed to the Iowa Supreme Court but withdrew his notice of appeal before the court considered the matter. In September 1979 Petitioner filed suit to quiet title to a strip of land in the vicinity of the condemned property. The matter was tried to the court and title was quieted in the City. Petitioner's appeal was dismissed for failure to prosecute. In June 1980 Mr. Korey sued to enjoin the City from entering the condemned land and from constructing the bicycle path. After a hearing, Petitioner was denied a temporary injunction and a cost judgment was entered against him. In February 1982 Petitioner filed a small claims action for flooding damage to crops. The action was amended to include a prayer for an injunction to abate a nuisance obstructing his drainage. He voluntarily dismissed before the case was set for trial. This action followed in October of 1983 on Mose

Korey's pro se complaint under 42 U.S.C. Sections 1982, 1983, 1985 and 1986, alleging violations of various rights, including the taking of property without just compensation and in violation of condemnation statutes, HUD rules and a court order, freedom of speech and to petition for redress of grievances, invasion of privacy, conspiracy, discrimination and harassment. After the answer and some discovery, the City moved for summary judgment based on the applicable statutes of limitations, laches, estoppel, and claim and issue preclusion. Petitioner vigorously resisted. The motion was sustained by the Honorable William C. Stuart, United States District Court for the Southern District of Iowa. Petitioner's request to reconsider was overruled. He then appealed to the United States Court of Appeals for the Eighth Circuit which summarily affirmed the District Court prior to receipt of the City's brief and now petitions for a writ of certiorari.

ARGUMENT

I. The Procedural Issues Presented By Petitioner Do Not Require Resolution By This Court.

Petitioner presents several matters of procedure as grounds for granting certiorari. The orders of which he complains are in accord with established rules and procedures and do not involve important or substantial questions of practice and judicial administration.

Petitioner's first complaint is that he was not given three additional days for filing his rehearing petition. While Rule 26(a), FRAP, does add three days when a party is to act within a specified number of days after a document is served upon him and the document is served by mail, the time for filing a petition for rehearing runs not from service but rather from the entry of judgment. Rule 40(a), FRAP. Judgment was entered August 15, 1985, and Petitioner was required to file his rehearing petition within 14 days thereof. It was filed when it was received by the clerk pursuant to Rule 25(a), FRAP. That was on the 15th day. The Court of Appeals correctly ruled it was untimely.

Petitioner's second complaint concerns the finality of the order of August 15, 1985, as it pertains to his time for petitioning this Court. The order in question was the judgment of the Court of Appeals affirming summary judgment for the City. It conclusively determined the rights of the parties, leaving nothing to be done but execution of the judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, 357 (1978); *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911, 916 (1945).

His third complaint is that the orders and filings from the Court of Appeals do not bear the signature of a member of the Court. As is clear from Rules 36 and 41(a) FRAP, the appellate courts are not required to issue opinions and the clerk is responsible for preparing, signing and entering judgment, and pro-

viding copies thereof to the parties. This was done. Nothing more is required of the Court of Appeals or to be expected by the parties.

The clerk and court below acted pursuant to the applicable and established procedural rules and practices. Petitioner has failed to present questions of substantial importance affecting practice and judicial administration. The petition for writ of certiorari should, therefore, be denied.

II. There Is No Conflict Between The Rulings Below And Decisions Of Other Circuits Or The Supreme Court Warranting The Granting Of The Petition For Writ Of Certiorari.

Petitioner alleges the existence of a conflict between the decisions below and decisions elsewhere as justifying review by this Court. This conflict is an illusion, created by pulling quotations from a number of Supreme Court and Circuit Court decisions out of context. Showing that courts have said summary judgment is improper when the motion is not properly supported or when there are genuine issues of material fact is to show nothing by way of a conflict in decisions. It is quite clear that summary judgment can be granted in cases involving constitutional and civil rights claims where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See, for example, *Gorin v. Osborne,* 756 F.2d 834 (11th Cir. 1985); *Russell v. Harrison,* 736 F.2d 283 (5th Cir. 1984); *Benavidez v. Gunnell,* 722 F.2d 615 (10th Cir. 1983); *Silverman v. Ballantine,* 694 F.2d 1091 (7th Cir. 1982).

Showing that courts have found a genuine issue of material fact in a couple of cases where fraudulent concealment was interposed in the face of a statute of limitations defense is to show nothing by way of a conflict as each case must be determined on its own facts. In resisting summary judgment, Petitioner did not deny he had consulted with counsel regarding his rights and

remedies in the early to mid 1970's, nor did he present any evidence that critical information was concealed from him, much less concealed for such a period as to make his suit timely.

Showing that as a pro se plaintiff he is to be held to a less stringent standard of pleading, per *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), *rehearing denied,* 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 819 (1972), is to show nothing by way of a conflict as this case arises on summary judgment not on a motion to dismiss for failure to state a claim upon which any relief can be granted.

That a plaintiff is entitled to a federal jury does not require a useless jury trial. Indeed, the purpose of summary judgment is to avoid useless trials. *Klinge v. Lutheran Charities Ass'n. of St. Louis,* 523 F.2d 56, 61 (8th Cir. 1975).

There is no true conflict between the rulings in this case and decisions of other circuits or of the Supreme Court. Granting the petition for writ of certiorari on this basis is not justified.

III. As The Summary Judgment Motion Was Correctly Decided, Review By This Court Is Unnecessary.

In this action, the Petitioner has consistently misapprehended the narrow scope of the issues presented by the summary judgment motion. The major inquiries are simply whether his suit was brought in time and whether he previously had his day in court on the complaints he urges. The facts germane to these issues are the times at which the actions complained of occurred, when Petitioner acquired knowledge of them and the history of the litigation between the parties, and these facts are not disputed. The facts were analyzed by the District Court in light of the applicable legal principles, namely the established rules of limitations of actions and claim and issue preclusion. After doing so, the District Court entered summary judgment for the City and the Court of Appeals summarily affirmed finding no error of law or fact. While the outcome of this case is of great interest to the parties, the propriety of summary judgment

here is not a question of such overriding and substantial public interest as to require review by this Court.

A. Statute of Limitations.

Until the recent decision in *Wilson v. Garcia,* 471 U.S. ____, 107 S.Ct. ____, 85 L.Ed.2d 254 (1985)[1], the Iowa statute of limitations applicable to federal civil rights action other than those brought under Section 1986[2], was the five year period for actions not otherwise provided for, *Code of Iowa,* Section 614.1(4). *Branchcomb v. Brewer,* 683 F.2d 251 (8th Cir. 1982); *Garmon v. Foust,* 668 F.2d 400 (8th Cir. 1982), *cert. denied,* 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Tatum v. Golden,* 570 F.2d 753 (8th Cir. 1978), *cert. denied,* 436 U.S. 960, 98 S.Ct. 3079, 57 L.Ed.2d 1127 (1978). All causes of action accruing prior to October 21, 1978, 5 years before the complaint was filed, are therefore barred. Civil rights claims accrue at the time of the discriminatory or wrongful act, not when the consequences of the act become painful. *Chardon v. Fernandez,* 454 U.S. 6, 8, 102 S.Ct. 28, 70 L.Ed.2d 6, 9 (1981) (per curiam); *Delaware State College v. Ricks,* 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431, 439-440 (1980). Almost all the acts of which petitioner herein complains occurred before October 21, 1978: the 1969 condemnation, an alleged refusal to allow his attorneys to address the City Council or the Mayor in 1972, an alleged refusal to allow Petitioner to farm or plant a garden on the condemned land in 1975, permitting the Davenport Water Company to trample or destroy Petitioner's crops in 1975. Acts occurring subsequent to that date were the 1980 condemnation and drainage improvement project, the 1980 bicycle path con-

---

[1] Holding that the proper statute of limitations is the forum state's personal injury tort limitations statute, rather than the one which most closely corresponded to the federal claim.

[2] 42 U.S.C. Section 1986 contains a one year statute of limitations. All acts of which Petitioner complains occurred more than one year before the complaint was filed.

struction, the 1981 refusal to allow Petitioner to take firewood, and perhaps intermittent flooding, none of which rise to the level of constitutional torts and all of which are disposed of by the other grounds of the summary judgment motion. Even these are barred by Iowa's two year statute of limitations for personal injury torts. *Code of Iowa,* Section 614.1(2).

Petitioner appears to be placing reliance upon the doctrine of fraudulent concealment to delay the running of the statute of limitations. The doctrine does not assist him. This case is distinguishable from *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984), appeal pending, where the untruthful testimony was not discovered until 19 years after the incident when a witness recanted and where a far-reaching conspiracy to conceal the true facts existed. The undisputed facts presented in support of summary judgment here show Petitioner knew about the procedures that were followed in the 1969 condemnation from the very beginning and he was concerned about possible violations of his rights as early as 1971. In 1973, he consulted counsel about available remedies and legal theories for the alleged unlawful condemnation and alleged rights violations. The condemnation was a matter of public record. A person who has knowledge of a cause of action cannot claim concealment even though the details of the evidence to support the claim are not known to him. *Gruener v. City of Cedar Falls,* 189 N.W.2d 577, 581 (Iowa 1971).

Allowing Petitioner to now complain of acts occurring in the late 1960's and early 1970's, acts of which he was aware, and about which he has been concerned since their occurrence, would result in chaos and a total lack of finality in the affairs of man and government.

To the extent this action involves claims not rising to the level of constitutional torts or falling within the parameters of 42 U.S.C. Section 1982, et seq., such claims are barred by *Code of Iowa,* Section 613A.5 except any arising between April 21, 1983

and October 21, 1983.[3] Petitioner has acknowledged that he did not submit a notice of claim under the statute. He has not specifically pleaded any loss or damage accruing within 6 months of the filing of his complaint and the record reveals none.

The facts material to this ground of the summary judgment motion were not and are not in dispute. The law is clear. The courts below correctly determined that the claims were barred by the applicable statute of limitation. Review by this court would serve no public purpose.

B. Claim and Issue Preclusion

The other major basis for the motion was that Petitioner previously had his day in court on many of the issues presented. The principles of res judicata and collateral estoppel (claim and issue preclusion) apply to civil rights actions. *Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); *Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed.2d 308 (1980). The preclusive effect to be given state court adjudications is governed by state law. *Migra,* 79 L.Ed.2d at 63-64. Under Iowa law, the actions must generally involve the same evidence, the same transactions, and the same parties. *Bd. of Sup'rs, Carroll County v. Chi. & NW Transp. Co.,* 260 N.W.2d 813, 816 (Iowa 1977). The claim and all attendant arguments and theories are put to rest and no matters growing out of the claim which could have been presented to the first court can be presented to the second. *B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc.,* 242 N.W.2d 279, 286 (Iowa 1976). The Eighth Circuit in *Robbins v. District Court of Worth County, Iowa,* 592 F.2d 1015 (8th Cir. 1979), prohibited litigation of issues which were raised in the earlier state court action, as well as those which might have been raised.

---

[3] Petitioner has repeatedly asserted he is not relying on tort allegations and does not seek recovery therefore.

Plaintiff now complains that the condemnation damages awarded were inadequate. He litigated this issue in 1971 and 1972, and received a verdict of nearly double the amount of the condemnation commission award. He was represented by counsel. He was entitled to present all available evidence on all allowable elements of damages. Under Iowa law the claims of illegality and of failure to comply with statutes, H.U.D. rules and court orders could have been asserted in the 1969 action for injunctive relief (which he aborted) or in the appeal from the condemnation commission award or even in his later actions to quiet title and enjoin construction of the bicycle path. See *Halweg v. City of Sioux City,* 189 N.W.2d 623 (Iowa 1971); *Bourjaily v. Johnson County,* 167 N.W.2d 630 (Iowa 1969);[4] *Heinz v. City of Davenport,* 230 Iowa 7, 296 N.W. 783 (1941).

Mr. Korey's challenges to the condemnation procedures and his prayer for a larger condemnation award were litigated or should have been raised in his prior suits. Because of this, they are barred by claim and issue preclusion and cannot be litigated now. The litigation history and issues presented in the various cases are not matters upon which there is any factual dispute. The rulings below were correct in light of the Iowa holdings on claim and issue preclusion. The granting of summary judgment for the city on this basis was correct. The numerous lawsuits brought by Mr. Korey against the city over more than a decade have effectively disposed of the claims presented herein, and the pending action should, therefore, be put to rest.

---

[4] Here, the court went so far as to comment on the difficulty one could encounter in challenging a condemnation award without raising notice and procedural issues. 167 N.W.2d at 635.

CONCLUSION

Wherefore, Respondent respectfully prays the petition for writ of certiorari be denied.

Respectfully submitted,

Patricia Rhodes Cepican
McDONALD, STONEBRAKER
& CEPICAN, P.C.
3432 Jersey Ridge Road
Davenport, Iowa 52807

Attorneys for Respondent

Supreme Court, U.S.
FILED
JAN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-978

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
RULE OF PROCEDURE INVOLVED	ii
STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	6
CERTIFICATE OF SERVICE	8

RULE OF PROCEDURE INVOLVED

Supreme Court Rules:

Rule 28.2: (In pertinent part)

> ".2. To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, and if there is filed with the Clerk a notarized statement by a member of the Bar of this Court, setting forth the details of the mailing, and stating that to his knowledge the mailing took place on a particular date within the permitted time."

NO. 85-978

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MOSE KOREY,

Petitioner,

VS.

CITY OF DAVENPORT, IOWA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF

STATEMENT OF THE CASE

Petitioner MOSE KOREY is submitting this REPLY BRIEF in order to address a number of points raised in Respondent's BRIEF IN OPPOSITION and to re-emphasize Petitioner's bases for this PETITION FOR WRIT OF CERTIORARI.

ARGUMENT

I. RESPONDENT HAS NOT PRESENTED SUFFICIENT ARGUMENTS TO OVERCOME THOSE PRESENTED IN PETITION FOR WRIT OF CERTIORARI.

A. Respondent admits to certain facts alleged by Petitioner as bases for his position that his claims are not barred by any applicable statute of limitations.

On page two (2) of BRIEF IN OPPOSITION Respondent agrees that "An order was issued setting a hearing for a temporary injunction and directing the City to take no further action pending the hearing."

This supports Petitioner's position that the City proceeded to violate the said Temporary Restraining Order the very next day, and that all valid condemnation proceedings ceased at that time, and that therefore, there

was no "valid governmental action" to protect the Defendant City from Petitioner's complaint that federally protected property rights were infringed, and that the issues Petitioner is raising involve important or substantial questions of practice and judicial administration.

B. In the absence of any court order or local rule of the United States Court of Appeals for the Eighth Circuit to the contrary, it remains Petitioner's position that Petitioner's PETITION FOR REHEARING BY PANEL was timely filed, particularly since it is the practice of the Supreme Court, as found in Supreme Court Rules, Rule 28.2, "....that any document shall be deemed timely filed if it has been deposited in a United States post office or mail-

box, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, (emphasis added) and there is filed with the Clerk a notarized statement....".

Petitioner calls the Court's attention to the fact that, in Petitioner's PETITION FOR REHEARING BY PANEL, on page 12, is found the notarized CERTIFICATE OF SERVICE, signed by Petitioner, dated August 28, 1985, which was within the time allowed for filing, and Petitioner further asserts that the said notarized CERTIFICATE OF SERVICE constitutes the equivalent, for a Pro Se Petitioner, of the notarized statement of a member of the Bar of this Court, which is mentioned in said Supreme Court Rule 28.2.

C. The various court citations presented by Respondent in the BRIEF IN OPPOSITION do not address the issues raised by Petitioner, to wit:

1. fraud
2. fraudulent concealment
3. the fiduciary relationship between Petitioner and Defendant City
4. Violation of Temporary Restraining Order by Defendant City,

and their consequent tolling of the statute of limitations and their negation of other issues presented by Respondent City.

Petitioner has consistently challenged the validity of the alleged condemnation proceedings, including his refusal to accept the funds awarded by

the jury of January 19, 1972. Petitioner was thereby unable to invest these funds and collect a considerable amount of interest. Petitioner accepted the payment, after ten years, under protest, in order to protect his interests.

CONCLUSION

WHEREFORE, Certiorari should be granted.

Respectfully submitted,

Mose Korey

MOSE KOREY, Pro Se
3026 Belle Avenue
Davenport, Iowa 52803

Phone: (319) 359-0272
(319) 323-8945

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

VERIFICATION

I, MOSE KOREY, being first duly sworn, state and depose that I have read the foregoing REPLY BRIEF, that I am familiar with it's content, and that I understand it and swear that everything therein is true and correct to the best of my information, personal knowledge and belief.

Mose Korey

MOSE KOREY

Subscribed and sworn to before me on this 21st day of January, 1986.

Jean Mateer

NOTARY PUBLIC



STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

CERTIFICATE OF SERVICE

This is to certify that the undersigned did on this 21st day of January, 1986, deposit in the U.S. Mail, postage prepaid for delivery by first class mail to the following addressee:

1. Mr. Alexander L. Stevas, Clerk
United States Supreme
Court Building
1 First Street, N.E.
Washington, D.C. 20543

forty-three copies of:

REPLY BRIEF

for filing, of which three (3) copies are to be returned to Petitioner after filing.

2. Patricia Rhodes Cepican
3432 Jersey Ridge Road
Davenport, Iowa 52807

three (3) copies of same document.

I further certify that, in compliance with Supreme Court Rule 28.5(c), all parties required to be served have been served.

Mose Korey
MOSE KOREY

Subscribed and sworn
to before me on this
21st day of January, 1986.

Jean Mateer
NOTARY PUBLIC

JEAN MATEER
MY COMMISSION EXPIRES
8-29-88